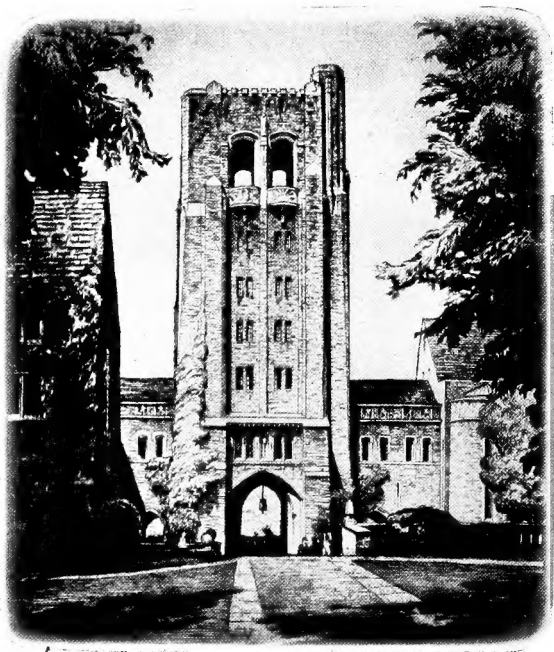


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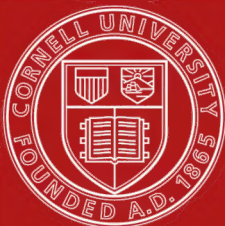
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# THE ORGANIZATION AND MANAGEMENT OF BUSINESS CORPORATIONS

By WALTER C. <sup>Collins</sup>CLEPHANE, LL. M.

OF THE BAR OF THE SUPREME COURT OF THE UNITED STATES; PROFESSOR OF THE  
LAW OF THE ORGANIZATION AND MANAGEMENT OF CORPORATIONS IN  
THE GEORGE WASHINGTON UNIVERSITY OF WASHINGTON, D. C.

SECOND EDITION

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(CLEPH.BUS.C.,2D ED.)

# PREFACE TO SECOND EDITION

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THE reception of the first edition of this book at the hands of the public has been so generous, and so far in advance of anything which the author had any right to expect, that, with great diffidence, he has felt constrained to respond to a demand that the scope of the work be somewhat enlarged, so as to include brief discussions of topics not touched upon in the first edition.

In mapping out the second edition, the effort has been constant to bear in mind the original purposes for which the work was written; i. e., to afford a practical guide to students, officers of corporations, and lawyers whose practice has not caused them to specialize in this branch of the law, in the shape of a convenient handbook in which may be found laid down without too much elaboration those principles which are found of daily application in the organization and management of business corporations. Because of the brevity of treatment of some of the subjects touched upon in the first edition, and the decisions announced by the American courts since its publication, it was deemed wise to almost entirely rewrite the book, so that it may lay before the reader, in so far as it may lie in the power of the author to do so, a correct statement, as of the date of publication, of so much of the corporation law as is herein discussed.

In order that the work may be of more value to the practicing lawyer, the number of cases cited has been many times multiplied. New chapters have been added, dealing with subjects not treated in the first edition, as, for instance, the relation of promoters, incorporators, and officers, to the corporation, its members, and the outside public, the principles governing the proper capitalization of corporations, the kinds of corporate obligations and the security for same, and the dissolution of corporations. The treatment of other subjects,

such as the rights, duties, and liabilities of stockholders and directors, the adoption and amendment of by-laws, and the issue and transfer of stock, has been greatly enlarged.

Especial attention is called to the chapter dealing with voting trusts. The tremendous increase in the use of such instruments during the past five years has resulted in numerous recent decisions of our courts which are tending to clarify many of the mooted questions involved in such arrangements. With the object of giving the reader the benefit of the latest judicial utterances upon this subject as compared with the earlier doctrines, all of the decisions found in the various American courts have been classified by states, and an exposition of the present condition of the law in each state whose courts have dealt with this topic, has been attempted.

While diligent efforts have been made to state with accuracy all that is found between these covers, it is probably too much to hope that such a work can go to press without the inclusion of some errors. Notwithstanding such may be discovered, the aim has been to place within easy access of others that degree of assistance which the author would have welcomed had some one else extended it to him in years gone by.

WASHINGTON, D. C., May 1, 1913.      WALTER C. CLEPHANE.

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## PREFACE TO FIRST EDITION

---

A FEW years ago a course of lectures was inaugurated in the Law Department of the Columbian (now The George Washington) University, of Washington, D. C., dealing with the organization and practical management of business corporations. Prior to that time the substantive law of corporations had been most ably taught in that department by a distinguished jurist occupying a seat on the bench of the Supreme Court of the

United States. But because of the growing tendency of modern business men to incorporate, there arose a demand for a short practical course informing the students, who were to enter upon the active duties of their profession, exactly how to apply the principles they had learned at the feet of so eminent an instructor, and, starting with the request of the client that his business be incorporated, how to go through the successive stages essential to a valid and successful organization. The university, ever ready to keep pace with modern conditions, responded to the call, and the new chair was entrusted to the author.

Much to his regret, he found no text-book dealing with the subject in such a way as to enable him to place it in the hands of his students. He was obliged, therefore, to map out the course for himself in a series of lectures extending over a few weeks. Those lectures form the basis of this treatise, which has been compiled as a text-book for the classes studying this subject in The George Washington University. The author has also had in view the needs of many lawyers who may not have had the advantages of practical corporation office work, and who, therefore, may desire some guide along the lines referred to. It is believed, too, that many laymen who are officers of corporations will find the book useful to them in carrying on their work.

The object of the author being as above stated, no attempt has been made to enter into a discussion of principles, except in so far as such discussion is pertinent to some live topic of practical corporation law of frequent recurrence in modern times, but which may not be considered as fully settled. The volume does not pretend to be a treatise on corporation law, but may be said to bear the same relation to that subject as equity pleading and practice bears to equity jurisprudence. Principles have been stated, an understanding of which is essential to the intelligent organization of corporations and attention to the details of their management. Great care has been taken to verify and support by citations every principle

of law herein laid down. Inasmuch as corporation law is a subject of very rapid development during the past few years, in many instances the author has, without designating specific cases, referred to the most recent works on the subject, where a full discussion of the topics involved, with the cases applicable thereto, will be found. Frequent reference has thus been made to the very recent and admirable treatises on the law of corporations by Messrs. Clark and Marshall, and Mr. William W. Cook. Numerous citations will also be found of the tenth volume of the *Cyclopedia of Law and Procedure*, published during the present year, which consists almost wholly of a revised work on corporation law by that master of the subject, the late Hon. Seymour D. Thompson.

Many forms have been inserted which may be used in any jurisdiction. Forms corresponding to those which appear in some form books, and which are merely local in their character, will not be found here. In many instances the state statutes prescribe so minutely what must appear in certain corporation papers, and these statutes differ so materially one from another, that it has been found that the insertion of forms in such instances, intended to be general in their nature, has resulted in more harm than good.

While fully conscious that crudities and imperfections must exist in this work, the author submits it to the kind judgment of the public, in the hope that it may never prove misleading, but may serve as a convenient source of information to those seeking guidance in this field of research.

WALTER C. CLEPHANE.

WASHINGTON, D. C., January 1, 1905.

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# THE ORGANIZATION AND MANAGEMENT OF BUSINESS CORPORATIONS

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## SECOND EDITION

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### CHAPTER I

#### ORIGIN AND DEVELOPMENT OF BUSINESS CORPORATIONS

- § 1. Necessity for Corporations.
- 2. Corporations in Greece and Rome.
- 7. French Mercantile Associations.
- 9. English Mercantile Guilds.
- 10. English Regulated Companies.
- 14. Corporations in the United States.
- 16. Corporations in Other Nations.

#### § 1. Necessity for Corporations.

"A stock corporation is now an absolutely essential piece of machinery in commerce. Without it the great affairs of modern times would not have been undertaken, and, if undertaken, would not have been accomplished." This was the statement made by the President of the American Bar Association, Edgar H. Farrar, Esq., at the annual meeting of that body held in 1911.<sup>1</sup> It meets with an affirmative response from every practical business man and lawyer of the present

<sup>1</sup> Reports Am. Bar Ass'n, 1911, p. 233.

day. Curiosity naturally leads us to inquire whether a contrivance so vital to the conduct of the business of to-day is something altogether new, brought forth because of changed conditions of society, or whether it is simply a new manifestation of an old idea.

## § 2. Corporations in Greece and Rome.

It may be that corporations were known to the ancient Greeks. As to this we have very little direct evidence.<sup>2</sup> Such institutions were, however, well known to the Romans, not exactly in the form in which we now have them, with certificates of stock easily transferable; but to some extent the entity of corporations, as distinguished from that of the individuals composing them, was well understood.

§ 3. As early as the reign of Numa Pompilius guilds of workmen existed. No Roman citizen in the early days of the republic could follow trade as a profession without forfeiting his political rights. But the inducements to embark in some remunerative occupation were then, as now, too great to be withstood. When it became recognized that a citizen could, without jeopardizing his political status, hold an interest in these associations of workingmen, it grew by no means uncommon for men most prominent in the councils of state to eke out their independent incomes in this way.

§ 4. At first these guilds were mere voluntary partnerships, but influenced, doubtless, to some extent by the fact that men of the standing of Cato<sup>3</sup> were accustomed to investing heavily in business enterprises of this character, a gradual change took place in the status of these organizations in the eyes of the law. Just how and when these guilds became vested with an artificial existence and permitted to hold property in perpetuity is not very clear; but it is manifest that before the republic passed out of existence such organizations

<sup>2</sup> Ayliffe on Civil Law, 197.

<sup>3</sup> 2 Plutarch's Lives, Clough's Translation, 344.

were well recognized by judges and lawyers as possessing a distinct corporate character.

§ 5. No restriction was placed upon the capital of these organizations, and, as might have been expected, they increased in wealth and influence to such an extent as to constitute serious rivalry with the old Roman *familia*, to the great alarm of the patricians. Plots were discovered by which leases of state lands and public contracts were entered into on most discreditable terms with corporations in which public officials were shareholders; and the modern spectacle of a popular clamor against corporations was presented. As a concession to the bitter feeling which developed, a statute was enacted in the year 64 B. C. which absolutely dissolved most of these corporations, leaving only a few composed of those engaged in manual labor, such as the guilds of smiths, etc.

§ 6. But the lack of wisdom in this act soon became apparent, for six years later most of the charters which had been repealed by the act of 64 B. C. were revived and authority given for the creation of new corporations. It does not appear that the more modern conception of an absolute line of demarcation between the artificial entity of a corporation and the natural entity of the individuals composing it uniformly prevailed at that time, for in some instances at least the property of the members, outside of their interests in the corporation, was subjected to an implied hypothecation for its debts.<sup>4</sup>

### § 7. French Mercantile Associations.

Notwithstanding the well-developed code of corporation law which we must suspect, rather than know with absolute certainty, existed among the early Romans, it seems singular that the potentialities of such organizations seem to have been lost sight of for several centuries. It is true that brotherhoods of merchants and artisans for mutual protection and aid and

<sup>4</sup> Modern Polit. Inst. Baldwin, 143-153.

for the regulation of trade and commerce were common in the Middle Ages. To these guilds and brotherhoods charters were often granted, but they had no special legal form or personality, and, instead of being considered as in the nature of the forerunners of the modern business corporations, they appear merely to have been a somewhat distinct social development, brought forth and fostered by the exigencies of the times.

§ 8. In this class may be placed the associations which Henry III of France, by his general edicts of 1582 and 1587, legalized. He directed the association in every city of those engaged in each of the leading arts and trades into a separate body, to which he gave a large regulative authority, both as to workmen and merchants. This system stood for two hundred years, and grew steadily more and more unpopular.<sup>5</sup>

#### § 9. English Mercantile Guilds.

These guilds were quite similar to those which existed in England during the same period, and which offended the popular taste for the same reasons.<sup>6</sup>

#### § 10. English Regulated Companies.

Side by side with these there were developed in England, as far back as the thirteenth century, corporations known as "regulated companies," into which the original incorporators were required to admit associates who might desire to trade within the territory embraced in the special charter, which always created them, on payment of a certain fee. Each member, however, traded separately for himself, and on his own capital, and at his own risk. He received by membership the right to participate in the commerce within the jurisdiction of the company. By the close of the reign of Elizabeth we

<sup>5</sup> Modern Polit. Inst. Baldwin, 161.

<sup>6</sup> Id.; Corporations, Their Origin and Development, Davis, 148-228.

are informed that corporate monopolies of this character had swept five-sixths of the foreign trade of England into the port of London, and placed it there in the hands of two hundred men, who were shareholders in one or another of these companies of merchants.

§ 11. The patents under which the colonies in America were settled partook largely of this character.

§ 12. Some of these corporations issued transferable shares of stock somewhat similar to those now in vogue. They were chiefly companies engaged in trade with distant parts of the world, such, for instance, as the East India Company and the Hudson's Bay Company.<sup>7</sup>

§ 13. The ease with which private business enterprises upon a small scale could be conducted in the corporate form does not seem to have been very firmly impressed upon the minds of men until the advent of the last century, and it is only within the last twenty-five or thirty years that the conduct of business by corporations, rather than partnerships, may be said to have become the rule.

#### § 14. Corporations in the United States.

Prior to 1800 it is probable that no more than one hundred business corporations existed in the United States. This may be due to some extent to the fact that the colonial Legislatures had received a severe check upon their disposition to grant such charters because of the extension to the colonies, by the act of Parliament of 1741, of the famous English "Bubble Act" of 1720, which prohibited the formation of such organizations.<sup>8</sup>

<sup>7</sup> Corporations, Their Origin and Development, Davis, vol. 2, chs. 3, 4, and 5; Modern Polit. Inst. Baldwin, 164-179.

<sup>8</sup> Reports Am. Bar Ass'n, 1911, p. 234; 3 Anglo-Am. Legal Essays (Williston) 195.

§ 15. Since the old Roman corporations created under the general laws became merely matters of historical interest, business corporations had always been organized under special acts of the Legislature up to the year 1811, when the state of New York, for the first time in the history of the world, it is believed, since the days of Queen Elizabeth, passed a general law permitting the formation of companies, for the purposes of carrying on the manufacture of woolen, cotton, and linen goods, glass, and a few other specified commodities, also to engage in ironmongery. Similar legislation was soon after enacted in other states, a gradual broadening of policy in the direction of taking in all branches of business being observable; so that by 1850 many of the states in the Union had established general incorporation laws.<sup>9</sup>

#### § 16. Corporations in Other Nations.

The first general incorporation statute was not enacted in England until 1844.<sup>10</sup> While the modern corporation for private business purposes has been known in France for over a hundred years, it was not until 1863 that that nation passed a general act authorizing the organization of such bodies.<sup>11</sup> Belgium had done the same thing shortly before. Brazil followed soon afterwards, as did also Germany in the year 1870. In 1875 Hungary passed its first general incorporation law. In 1882 Italy fell into line. Switzerland adopted such a law in 1883, and Spain in 1885. The policy of enacting legislation which throws open to the public generally the privilege of incorporating for business purposes is now common to nearly every nation in the civilized world.<sup>12</sup>

<sup>9</sup> Mod. Polit. Inst. Baldwin, 195; Act March 27, 1811 (Laws N. Y. 1811, ch. 67, p. 111).

<sup>10</sup> Mod. Polit. Inst. Baldwin, 203.

<sup>11</sup> Id. 183.

<sup>12</sup> Id. 207-210.

## CHAPTER II

### REASONS FOR INCORPORATING

- § 17. The Primitive Tradesman.
- 18. Origin of Partnerships.
- 19. Dangers of Partnerships.
- 20.     1. Death or Disability of Partner.
- 21.     2. Sale or Pledge of Partnership Interest.
- 22. Motives Prompting Incorporation.
- 24. Advantages of Incorporating.

#### § 17. The Primitive Tradesman.

With the enlargement in facilities for communication between the different quarters of the globe has arisen the necessity for providing the means to supply the ever increasing demands of commerce. When the hamlet stood as the commercial unit, the petty shopkeeper, who undertook to supply his neighbors with the necessities of life, could easily with a limited capital do all that the exactions of his business required. The fact that he made himself liable personally for the breach of his contracts, or for wrongs committed by him, disturbed him very little, because he was able to keep in personal touch with all that pertained to his calling and steer clear of any danger of this kind.

#### § 18. Origin of Partnerships.

But when the opportunities arising from trade with other neighborhoods were once grasped by mankind, it became speedily apparent that, unless possessed of unusual wealth, no one man could raise and utilize sufficient capital to enable him to prosecute successfully any species of business or industry of larger magnitude than that of the small tradesman. Hence copartnerships sprang into existence, and became the forerun-

ners of the great commercial houses so characteristic of the business world a few years ago.

### § 19. Dangers of Partnerships.

Among the legal incidents of partnerships is the principle that each partner is bound by the acts of every other member of the firm within the scope of the partnership business.<sup>1</sup> Not only is he liable to the extent of his proportionate part of the capital invested in the enterprise, but personally for the entire indebtedness contracted by any one of his associates on account of the joint undertaking.<sup>2</sup> Among a large number of persons there is almost sure to be at least one who would develop dishonest traits or prove unwise, and whose actions would involve all the members in unfortunate complications. So that it would be a hazardous thing for any one to become enwrapped in such an entanglement and expose himself and his family to the loss of all that which by his own industry or the efforts of others before him had been accumulated for the support of his declining years.

### § 20. Death or Disability of Partner.

Another principle of partnership law is that upon the death of one of the members of the firm the firm is *eo instante* dissolved.<sup>3</sup> Not only are the relations of the survivors with the

<sup>1</sup> *Winship v. Bank of United States*, 30 U. S. (5 Pet.) 529, 8 L. Ed. 216; *Andrews v. Congar*, 131 U. S. Append. clxxxiii, 26 L. Ed. 90; *Capelle v. Hall*, Fed. Cas. No. 2,391; *McDormont v. Hicksen*, 9 Ky. Law Rep. (abstract) 1012; *Midland Nat. Bank v. Schoen*, 123 Mo. 650, 27 S. W. 547; *Hoskinson v. Elliot*, 62 Pa. (12 P. F. Smith) 393; *T. Pars. Partn.* §§ 108, 114, 115; *Story, Partn.* §§ 101, 102, 126; 1 *Lindl. Partn.* p. \*124.

<sup>2</sup> *T. Pars. Partn.* §§ 249, 253; *Story, Partn.* § 260; 1 *Lindl. Partn.* p. \*200.

<sup>3</sup> *Burwell v. Cawood*, 43 U. S. (2 How.) 560, 11 L. Ed. 378; *Adams v. Ward*, 26 Ark. 135; *Huggins v. Huggins*, 117 Ga. 151, 43 S. E.

deceased terminated, but so, also, are the relations of the survivors amongst themselves,<sup>4</sup> unless there is a stipulation in the partnership agreement to the contrary.<sup>5</sup> The business must be immediately wound up, and a settlement made with the estate of the deceased member.<sup>6</sup> Into a company of many persons death must frequently come. The results of this doctrine of the legal dissolution of the firm upon death, therefore, are embarrassing in the extreme. It has also been held that the bankruptcy<sup>7</sup> of a partner, or his permanent disability to per-

759; *Frey v. Eisenhardt*, 116 Mich. 160, 4 Det. Leg. News, 1096, 74 N. W. 501; *Roberts v. Hendrickson*, 75 Mo. App. 484; *Evans v. Evans*, 9 Paige (N. Y.) 178; *Dawson v. Parsons* (Sup.) 20 N. Y. Supp. 65, judgment affirmed (1893) 66 Hun, 628, 21 N. Y. Supp. 212; *Dexter v. Dexter*, 60 N. Y. Supp. 371, 43 App. Div. 268; *First Nat. Bank of Alexandria v. Payne & Co.'s Assignees*, 85 Va. 890, 9 S. E. 153, 3 L. R. A. 284; *T. Pars. Partn.* §§ 342, 343; *Story, Partn.* § 317; 2 *Lindl. Partn.* p. \*590.

<sup>4</sup> *Knapp v. McBride*, 7 Ala. 19; *Mathison v. Field*, 3 Rob. (La.) 44; *Buard v. Lemée*, 12 Rob. (La.) 243; *Remick v. Emig*, 42 Ill. 342; *Hoard v. Clum*, 31 Minn. 186, 17 N. W. 275; *Story, Partn.* § 317; 2 *Lindl. Partn.* p. \*590.

<sup>5</sup> *Scholefield v. Eichelberger*, 32 U. S. (7 Pet.) 586, 8 L. Ed. 793; *Duffield v. Brainerd*, 45 Conn. 424; *Edwards v. Thomas*, 66 Mo. 468; *Hax v. Burnes*, 98 Mo. App. 707, 73 S. W. 928; *Saville v. Steer*, 60 Hun, 576, 14 N. Y. Supp. 398; *Peters v. Campbell*, 2 Ohio Dec. 526; *Gratz v. Bayard*, 11 Serg. & R. (Pa.) 41; *Laughlin v. Lorenz's Adm'r*, 48 Pa. (12 Wright) 275, 86 Am. Dec. 592; *Alexander's Ex'rs v. Lewis*, 47 Tex. 481; *McNeish v. United States Hulless Oat Co.*, 57 Vt. 316; *Davis v. Christian*, 56 Va. 11; *Moore v. May*, 117 Wis. 192, 94 N. W. 45; *E. R. Hawkins & Co. v. Quinette*, 156 Mo. App. 153, 136 S. W. 246.

<sup>6</sup> *T. Pars. Partn.* § 344 et seq.; *Story, Partn.* §§ 344, 347; 2 *Lindl. Partn.* p. \*591, and notes.

<sup>7</sup> *Lesser v. Gray*, 8 Ga. App. 605, 70 S. E. 104; *Fitch v. Pryse*, 4 Ky. Law Rep. (abstract) 904; *Havener v. Stephens*, 22 Ky. Law Rep. (abstract) 498, 58 S. W. 372; *Atwood v. Gillett*, 2 Doug. (Mich.) 206.

form the work which the partnership was organized to conduct,<sup>8</sup> will work a dissolution.

### § 21. Sale or Pledge of Partnership Interest.

Again, if one of the associates in a copartnership desires at any time to part with his interest in the firm, he must either sell to one of his copartners or else find a purchaser whom it is agreeable to his copartners to have associated with them. He cannot sell to a stranger, and give that stranger a right to become a member of the firm, without the consent of the other parties interested.<sup>9</sup> If he should attempt to make such a sale, that would of itself dissolve the partnership.<sup>10</sup> This necessarily restricts the field of negotiations, and so tends to reduce the purchase price of the interest offered. For the same reason it is difficult to borrow money upon the security of an undivided interest in a partnership business. Even if a sale is effected, the withdrawing member is not thereby released from liability for the partnership indebtedness, but continues liable not only for the debts contracted up to the time of his withdrawal, but also for all debts subsequently

<sup>8</sup> *Justice v. Lairy*, 19 Ind. App. 272, 49 N. E. 459, 65 Am. St. Rep. 405; *Casky v. Casky*, 5 Ky. Law Rep. (abstract) 775. See *Barclay v. Barrie*, 127 N. Y. Supp. 403, 142 App. Div. 670.

<sup>9</sup> *McNamara v. Gaylord* (1 Bond, 302) Fed. Cas. No. 8,910; *Meaher v. Cox*, 37 Ala. 201; *Freligh v. Miller*, 16 La. Ann. 418; *Kingman v. Spurr*, 24 Mass. (7 Pick.) 235; *Freeman v. Bloomfield*, 43 Mo. 391; *Filley v. Walker*, 28 Neb. 506, 44 N. W. 737; *Murray v. Bogert*, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; *Cochran v. Perry*, 8 Watts & S. (Pa.) 262; *Mason v. Connell*, 1 Whart. (Pa.) 381; *T. Pars. Partn.* § 112; 1 *Lindl. Partn.* p. \*363.

<sup>10</sup> *Miller v. Brigham*, 50 Cal. 615; *McCall v. Moss*, 112 Ill. 493; *De Manderfield v. Field*, 7 N. Mex. 17, 32 Pac. 146; *Mumford v. McKay*, 8 Wend. (N. Y.) 442, 24 Am. Dec. 34; *Cochran v. Perry*, 8 Watts & S. (Pa.) 262; *Appeal of Horton*, 13 Pa. (1 Harris) 67; *Ballard v. Callison*, 4 W. Va. 326; *Conrad v. Buck*, 21 W. Va. 396.

contracted in favor of those creditors not informed of his retirement.<sup>11</sup>

## § 22. Motives Prompting Incorporation.

These reasons, with others which it is hardly necessary to elaborate, have caused prudent men to abandon the attempt to do business of any considerable size as partners, and to seek some method of conducting their activities which will not expose them to the hazards above suggested. While the reasons advanced apply with peculiar force to large combinations of capital, comprising many individuals, the same principles prevail and cause inconvenience, though in a smaller degree, in more inconsiderable aggregations of capital. It must be remembered that the field of the wideawake business man is no more contracted than the world itself. The distant corners of the earth constitute his market just as truly as if the space which intervenes between him and them had been obliterated. By means of the cable and the wireless he is immediately apprised of the needs of the inhabitants of South Africa and of the islands of the sea, and must be prepared to meet the demands of these people, as well as of those who dwell nearer home, without delay. This necessitates the employment of a larger capital than was ever dreamed of in the early days of the business world. Instead of a combination of two or three individuals, dozens or hundreds or thousands of persons must unite their capital in a commercial enterprise.

§ 23. When this stage of business development was reached, the futility of partnerships was quickly discovered.

<sup>11</sup> *In re Cinque* (D. C.) 109 Fed. 455; *Bernard v. Torrance*, 5 Gill & J. (Md.) 383; *Bronx Metal Bed Co. v. Wallerstein* (Sup.) 84 N. Y. Supp. 924; *Kellogg v. Cayce*, 84 Tex. 213, 19 S. W. 388; *Story, Partn.* §§ 158, 161; *T. Pars. Partn.* §§ 313, 315; 1 *Lindl. Partn.* p. \*210, \*213.

## § 24. Advantages of Incorporating.

A corporation has the right to make by-laws prescribing and limiting the powers of its officers and agents;<sup>12</sup> those composing the corporation were not at common law individually liable for the debts of the concern;<sup>13</sup> the corporate existence was perpetual, and the death of a member did not legally affect it;<sup>14</sup> and shares of stock may be issued representing the interest of each member, which shares may be bought and sold in the open market, with the right in the purchaser to take the place of his vendor in the corporation irrespective of the wishes of the other stockholders.<sup>15</sup> In consequence of these incidents the present tendency among business men is to incorporate rather than subject themselves to the dangers surrounding business conducted under the form of a partnership.

<sup>12</sup> *Railway Equipment & Publication Co. v. Lincoln Nat. Bank*, 82 Hun, 8, 31 N. Y. Supp. 44; 1 Bl. Comm. pp. \*475, 476; *Cook, Corp.* § 4a.

<sup>13</sup> *Pollard v. Bailey*, 87 U. S. (20 Wall.) 520, 22 L. Ed. 376; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864; *Parkhurst v. Mexican S. E. R. Co.*, 102 Ill. App. 507; *Thompson-Houston Electric Co. v. Murray*, 60 N. J. Law, 20, 37 Atl. 443; *Seymour v. Sturgess*, 26 N. Y. 134; *Walker v. Lewis*, 49 Tex. 123; *Tayl. Priv. Corp.* § 700; 1 *Clark & M. Corp.* §§ 16, 20.

<sup>14</sup> *Fairchild v. Masonic Hall Ass'n*, 71 Mo. 526; *Geneva Mineral Spring Co. v. Coursey*, 61 N. Y. Supp. 98, 45 App. Div. 268, rehearing denied 62 N. Y. Supp. 1137, 47 App. Div. 634; 1 Bl. Comm. pp. \*468, \*475.

<sup>15</sup> *Morgan v. Struthers*, 131 U. S. 246, 9 Sup. Ct. 726, 33 L. Ed. 132; *Farmers' Loan & T. Co. v. Chicago, P. & S. R. Co.*, 163 U. S. 31, 16 Sup. Ct. 917, 41 L. Ed. 60; *New Orleans Nat. Banking Ass'n v. Wiltz (C. C.)* 10 Fed. 330; *Board of Com'rs of Tippecanoe County v. Reynolds*, 44 Ind. 509, 15 Am. Rep. 245; *Roosevelt v. Hamblin*, 199 Mass. 127, 85 N. E. 98, 18 L. R. A. (N. S.) 748; *Ingraham v. National Salt Co.*, 74 N. Y. Supp. 388, 72 App. Div. 582; *Id.*, 36 Misc. Rep. 646, 74 N. Y. Supp. 388, and 76 N. Y. Supp. 1016, 72 App. Div. 582, affirmed (1904) 179 N. Y. 556, 71 N. E. 1131; 1 *Cook, Corp.* §§ 7, 8; 1 *Clark & M. Corp.* §§ 16, 20; see chapter XXI, § 420.

## CHAPTER III

### CREATION OF CORPORATIONS

- § 25. Relations between Corporations and the State.
- 29. How Corporate Franchise may be Conferred.
- 30. 1. Special Charters—Grant.
- 31. Acceptance.
- 32. 2. General Enabling Statutes.
- 33. 3. Charter by Judicial Act.
- 34. 4. Charter by Voluntary Agreement.
- 35. 5. Charter by Certificate from State.
- 36. Validity of Charter.
- 37. What Constitutes Charter.

#### § 25. Relations between Corporations and the State.

A better understanding of the nature of the corporate franchise may perhaps be gained by a brief reference to the theories at different times underlying the relations between the corporation and the state creating it. Under the old idea it was considered that corporations, being creatures of the state, should be guarantied by it to the public in all particulars of responsibility and management. It was required that the capital stock (which was the fund to which creditors must look for the satisfaction of their demands) should be paid up to its full value in actual cash, and that the debts should not exceed the amount of its capital. Hence such intangible assets as good will, trade-marks, patents, and franchises generally could not be considered in making up the capital of a company. Creditors and stockholders were protected by the state with almost the same degree of solicitude as if they were persons non compos or minors.

§ 26. The more progressive states, finding that this policy was not adapted to modern business conditions, began to incline to the opposite extreme. Charters were granted which

enabled corporations to do anything that an individual could do and in any manner, leaving the stockholders and creditors to protect their own interests. Such persons, voluntarily choosing to deal with corporations whose rights and liabilities were definitely prescribed in the law creating them, were left to their own good sense and business judgment to safeguard their rights, without any effort upon the part of the state to aid them.<sup>1</sup>

§ 27. But when matters had gone to this extreme, the ease with which corporate affairs could be manipulated by evilly disposed managers to the prejudice of stockholders and creditors resulted in scandals of such magnitude and disastrous effects that within more recent years the effort of the states which have amended their corporation laws along the more liberal lines has been to adopt so much of the modern theories, and only so much, as is consistent with safety to the public.

§ 28. As an illustration of modern thought upon this subject, the report of the committee appointed by the state of Massachusetts to revise its corporation laws, transmitted to the Senate and House of Representatives of that commonwealth, January 14, 1903, is instructive. That committee (whose recommendations were subsequently adopted by the state Legislature) submitted a plan permitting the greatest possible latitude to business corporations in order to effect their purposes, provided that stockholders and creditors should at all times be precisely informed of all the facts attending both the organization and management of such corporations.<sup>2</sup> The state of Virginia has adopted a similar policy.<sup>3</sup>

### § 29. How Corporate Franchise may be Conferred.

The corporate franchise may be conferred either by special legislation to suit the individual case, or by general legislation

<sup>1</sup> Report of Committee on Corporation Laws, Commonwealth of Massachusetts (1903) pp. 20-28.

<sup>2</sup> Id.

<sup>3</sup> Act Va. May 21, 1903 (Laws 1903, c. 270).

under which any persons desiring to obtain the corporate privilege may associate themselves together and secure this as a matter of right.<sup>4</sup>

### § 30. Special Charters—Grant.

No particular words are necessary to the creation of a corporation, it being sufficient if the legislative intention is clearly manifest.<sup>5</sup> And where rights, privileges, and powers are granted by law to a body of persons by a collective name, and there is no mode by which such rights can be enjoyed or powers exercised without acting in a corporate capacity, such body is by necessary implication so far a corporation as to be enabled to enjoy and exercise such rights and powers.<sup>6</sup>

### § 31. Acceptance.

Inasmuch as a charter is a contract between the state and the corporation,<sup>7</sup> the transaction should be evidenced by such acts as would be required in the case of a valid contract. The passage of the law granting the charter may be considered

<sup>4</sup> Taggart v. Perkins, 73 Mich. 303, 41 N. W. 426; Douthitt v. Stinson, 63 Mo. 268; Smith v. Havens Relief Fund Soc., 90 N. Y. Supp. 168, 44 Misc. Rep. 594.

<sup>5</sup> Granger's Life & Health Ins. Co. v. Kamper, 73 Ala. 325; Mahoney v. Bank of State, 4 Ark. 620; Reed v. Bank of State, 5 Ark. 193; Murphey v. State Bank, 7 Ark. 57; Dean v. Davis, 51 Cal. 406; Proprietors of White School House v. Post, 31 Conn. 240; City of Louisville v. President, etc., of University of Louisville, 54 Ky. (15 B. Mon.) 642; Denton v. Jackson, 2 Johns. Ch. (N. Y.) 320; Commonwealth v. West Chester R. Co., 3 Grant, Cas. (Pa.) 200; Town of North Hempstead v. Town of Hempstead, 2 Wend. (N. Y.) 109; Thomas v. Dakin, 22 Wend. (N. Y.) 9.

<sup>6</sup> Stebbins v. Jennings, 27 Mass. (10 Pick.) 172.

<sup>7</sup> Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629; Branch v. Baker, 53 Ga. 502; Crease v. Babcock, 40 Mass. (23 Pick.) 334, 34 Am. Dec. 61; Pierce v. Emery, 32 N. H. 484; People v. Albany & V. R. Co., 37 Barb. (N. Y.) 216.

as an offer to the incorporators, which needs an acceptance to make it a binding agreement. Such a charter should, therefore, be accepted by the persons to whom the offer is made.<sup>8</sup> While it is not *essential* to the taking effect of an act of incorporation that the records of the company should show a formal acceptance of the act by the persons incorporated,<sup>9</sup> there should be something to indicate that those upon whom the privilege was conferred availed themselves of it. Action by the incorporators inconsistent with a nonacceptance of the franchise have been held sufficient for this purpose.<sup>10</sup> And it has been held that a charter granted to certain persons therein named is to be presumed, *prima facie*, to have been granted at their instance and to have been accepted by them.<sup>11</sup>

<sup>8</sup> State ex rel. Weir v. Dawson, 16 Ind. 40; Atkinson v. Tennill, 14 Ky. Law Rep. (abstract) 922; State v. Baltimore & O. R. Co., 12 Gill & J. (Md.) 399, 38 Am. Dec. 319; Smith v. Silver Valley Min. Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; Ellis v. Marshall, 2 Mass. 269, 3 Am. Dec. 49; Lincoln & Kennebec Bank v. Richardson, 1 Me. (1 Greenl.) 81, 10 Am. Dec. 34; People ex rel. Atty. Gen. v. Mich. Cent. R. Co., 145 Mich. 140, 108 N. W. 772, 13 Det. Leg. News 552; Haslett's Ex'rs v. Wotherspoon, 1 Strob. Eq. (S. C.) 209; Quinlan v. Houston & T. C. Ry. Co., 89 Tex. 356, 34 S. W. 738.

<sup>9</sup> Trott v. Warren, 11 Me. (2 Fairf.) 227; Russell v. McLellan, 31 Mass. (14 Pick.) 63.

<sup>10</sup> Bank of United States v. Dandridge, 25 U. S. (12 Wheat.) 64, 6 L. Ed. 552; Dorsey Harvester Revolving Rake Co. v. Marsh, Fed. Cas. No. 4,014; Logan v. McAllister, 2 Del. Ch. 176; State ex rel. Carlton v. Dawson, 22 Ind. 272; Middlesex Husbandmen v. Davis, 44 Mass. (3 Metc.) 133; Blandford Third School Dist. v. Gibbs, 56 Mass. (2 Cush.) 39; St. Paul Div. No. 1, Sons of Temperance, v. Brown, 11 Minn. 356 (Gil. 254); Penobscot Boom Corp. v. Lamson, 16 Me. (4 Shep.) 224, 33 Am. Dec. 656; Sumrall v. Sun Mut. Ins. Co., 40 Mo. 27; Boatmen's Bank v. Gillespie, 209 Mo. 217, 108 S. W. 74; Ameriscoggin Bridge v. Bragg, 11 N. H. 102; Taylor v. Commissioners of Town of Newberne, 55 N. C. (2 Jones, Eq.) 141, 64 Am. Dec. 566; McKay v. Beard, 20 S. C. 156.

<sup>11</sup> Newton v. Carbery, Fed. Cas. No. 10,190 (5 Cranch, C. C. 632); Talladega Ins. Co. v. Landers, 43 Ala. 115; City of Atlanta v. Gate City Gaslight Co., 71 Ga. 106.

### § 32. General Enabling Statutes.

There are two distinct methods recognized in the United States under general enabling statutes by which corporations may be organized: First, by application to a judicial tribunal, which grants the charter; and, second, by a formal written agreement, signed by the incorporators, which, upon being recorded in some designated office in the state, at once confers the right to be a corporation.<sup>12</sup>

### § 33. Charter by Judicial Act.

The states of Maryland and Virginia are typical illustrations of the states requiring a charter to be approved by the action of some judicial officer before it becomes effective.<sup>13</sup> It is usually enacted by statutes of this class that the articles of incorporation be prepared in much the same manner as would be required where no judicial action must be had; but, before the incorporators may receive their franchise, the judge of some court named in the statute must indorse upon the papers his approval, as indicating that the requirements of the law have been complied with. In preparing articles of association, the general principles applicable to the second method above alluded to will govern much of the procedure under the first.

### § 34. Charter by Voluntary Agreement.

Where the states have passed general enabling statutes, which permit persons desirous of becoming incorporated to avail themselves of this right in a certain manner, the method generally outlined is to have those interested draw up an agreement defining with more or less particularity their rights and privileges, and have this document properly signed and ac-

<sup>12</sup> 10 Cyc. 219.

<sup>13</sup> Act Md. March 31, 1908 (Laws 1908, p. 23); Act Va. May 21, 1903 (Laws 1903, c. 270).

knowledge and filed in some office named in the act of the Legislature.

### § 35. Charter by Certificate from State.

In some states, after the voluntary agreement above referred to has been filed in accordance with law, a certain designated officer, such as the Secretary of State, issues to the incorporators a formal charter, under the great seal of the state, reciting that the agreement has been filed, that it is in accordance with law, and that the incorporators have thereupon become a body corporate. The state of West Virginia follows this course,<sup>14</sup> and many incorporators prefer to be in possession of a document of this kind as tangible evidence of their franchise.

### § 36. Validity of Charter.

Inasmuch as the powers and privileges of the corporation are to be largely determined by the original agreement subscribed by the parties,<sup>15</sup> it is of prime importance that the agreement should at least substantially comply with the law.<sup>16</sup> By the word "law" is meant, not only the statute, but the Constitution of the state as well, because, if a corporation should be organized under a statute which is found to be

<sup>14</sup> Code W. Va. 1906, c. 54, § 9 (§ 2298); Code Supp. 1909, c. 55, § 3 (§ 2556).

<sup>15</sup> Gray v. Portland Bank, 3 Mass. 364, 3 Am. Dec. 156; O'Brien v. Cummings, 13 Mo. App. 197; Meredith v. New Jersey Zinc & Iron Co., 55 N. J. Eq. 211, 37 Atl. 539, affirmed 56 N. J. Eq. 454, 41 Atl. 1116; 10 Cyc. 222; Clark & M. Corp. § 127.

<sup>16</sup> Mokelumne Hill Canal & Min. Co. v. Woodbury, 14 Cal. 424, 73 Am. Dec. 658; McCallion v. Hibernia Sav. & Loan Soc., 70 Cal. 163, 12 Pac. 114; Fifth Baptist Church v. Baltimore & P. R. Co., 4 Mackey (D. C.) 43; Fire Dept. of New York v. Kip, 10 Wend. (N. Y.) 266; Burt v. Farrar, 24 Barb. (N. Y.) 518; Wilmington & M. R. Co. v. Wright, 50 N. C. (5 Jones, Law) 304.

unconstitutional, the charter is void;<sup>17</sup> although decisions are found which hold such a corporation to be a *de facto* corporation at least to the extent of preventing any one dealing with it as such from disputing its corporate character.<sup>18</sup> If the articles of association conflict with the act under which the company is supposed to be incorporated, the charter may be held invalid;<sup>19</sup> but if these articles merely contain a statement of broader powers than are permitted by the Constitution or laws of the commonwealth, the charter is invalid to the extent merely that it purports to confer powers in excess of those warranted by law, the enumeration of excessive powers being rejected as surplusage.<sup>20</sup> An official whose duty it is to pass upon the form of certificate of incorporation preparatory to receiving the same for record cannot, however, be compelled to receive a document which is not in accordance with law.<sup>21</sup>

<sup>17</sup> *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562; *Hurlbut v. Britain*, 2 Doug. (Mich.) 191; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

<sup>18</sup> *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400; *King v. Philadelphia Co.*, 154 Pa. 160, 26 Atl. 308, 21 L. R. A. 141, 35 Am. St. Rep. 817. See chapter XI, § 215.

<sup>19</sup> *Rhodes v. Piper*, 40 Ind. 369; *Byronville Creamery Ass'n v. Ivers*, 93 Minn. 8, 100 N. W. 387; *Lawrie v. Silsby*, 76 Vt. 240, 56 Atl. 1106, 104 Am. St. Rep. 927.

<sup>20</sup> *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 442, 24 L. R. A. 776; *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325; *Dancy v. Clark*, 24 App. D. C. 487; *City of Aurora v. West*, 9 Ind. 74; *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 44 N. E. 48, 57 Am. St. Rep. 230; *Indiana Bond Co. v. Ogle*, 22 Ind. App. 593, 54 N. E. 407, 72 Am. St. Rep. 326; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. (4 Kern.) 546; *Albright v. Lafayette Bldg. & Sav. Ass'n*, 102 Pa. 411; 10 Cyc. 1099; 1 Cook, Corp. § 4, and cases cited.

<sup>21</sup> *Dancy v. Clark*, 24 App. D. C. 487; *People ex rel. Davenport v. Rice*, 68 Hun, 24, 22 N. Y. Supp. 631; *In re Marvine Accidental Fund*, 3 Com. Pl. Rep. (Pa.) 36; *In re Pennsylvania State Sportsmen's Ass'n* (Com. Pl.) 11 Pa. Co. Ct. R. 576; *Id.* 1 Pa. Dist. R. 763.

## § 37. What Constitutes Charter.

The charter, therefore, legally consists of so much of the state Constitution as pertains to the corporation, and the statute under which it is formed, together with the articles of association,<sup>22</sup> though in the popular sense the charter consists either of the corporation agreement or the certificate of franchise issued by the state. The powers conferred upon the corporation will never exceed those contained in the charter, either expressly or by necessary implication.<sup>23</sup> Hence the necessity for great care in framing this document.

<sup>22</sup> Grangers' Life & Health Ins. Co. v. Kamper, 73 Ala. 325; Van Etten v. Eaton, 19 Mich. 187; Taggart v. Perkins, 73 Mich. 303, 41 N. W. 426; Abbott v. Omaha Smelting & Refining Co., 4 Neb. 416; Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 279, 62 N. W. 480; Gause v. Boldt, 49 Misc. Rep. 340, 99 N. Y. Supp. 442; Id., 115 App. Div. 897, 100 N. Y. Supp. 1117; Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 S. W. 796; Arkansas Stave Co. v. State, 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (N. S.) 255, 140 Am. St. Rep. 103.

<sup>23</sup> Thomas v. West Jersey R. Co., 101 U. S. 71, 25 L. Ed. 950; Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478, 35 L. Ed. 55.

## CHAPTER IV

## PROMOTERS

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## § 38. Promoters' Frauds.

It is probable that no greater impositions are practiced upon the investing public than by promoters in the organization of new corporations and the transfer of property to such companies for their corporate objects. The public as a rule has few facilities for ascertaining the previous dealings between promoters and the corporations leading up to the placing of stock upon the market. The courts are careful to protect investors whenever circumstances of fraud are subjected to judicial scrutiny. The rights and liabilities of promoters must be considered from several different standpoints.

## § 39. Promoters' Right to Contract with Corporation.

The principle of law is well settled that an incorporator may contract with his corporation, and sue or be sued on the con-

tracts so made by him,<sup>1</sup> always provided, however, that he acts in perfect good faith.<sup>2</sup> What is considered by the law to be good faith has been determined by a great many adjudicated cases.

#### § 40. Liability of Promoters to Corporation.

Persons, from the time they begin to form an association, stand in a fiduciary relation, not only to each other, but to all who subsequently become members thereof; and none of them can purchase property for the company, and sell it to the company at an advance, without disclosing the profit.<sup>3</sup> A fairly typical case illustrating this principle is that of *Las Ovas Co., Inc., v. Davis*,<sup>4</sup> decided by the Court of Appeals of the District of Columbia, and subsequently affirmed by the Supreme Court of the United States. In that case defendants secured an option to purchase certain lands for the sum of \$20,000. Before the option expired, they, with other persons who were unacquainted with the terms of the option, entered into an agreement to form a corporation for the purpose of buying and developing this property; the agreement reciting that the promoters were to acquire the land for \$35,000 and 40 per cent. of the stock of the company to be formed, to be divided equally among them. The company was to have a capital stock of \$150,000; so that \$60,000 of the stock was to go to the promoters. The original purchase price of the property under the option was intentionally concealed from

<sup>1</sup> *Culbertson v. Wabash Nav. Co.*, Fed. Cas. No. 3,464 (4 McLean, 544); *Rice v. Peninsular Club of Grand Rapids*, 52 Mich. 87, 17 N. W. 708; *McNamee v. Relf*, 52 Miss. 426; *Second Nat. Bank v. Greenville Screw Point Steel Fence Post Co.*, 23 Ohio Cir. Ct. R. 274.

<sup>2</sup> *Flint v. Eureka Marble Co.*, 53 Vt. 669.

<sup>3</sup> *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa, 396, 119 Am. St. Rep. 564, 107 N. W. 629; *Paducah Land, Coal & Iron Co. v. Mulholland*, 14 Ky. Law Rep. (abstract) 861. See *infra*, § 43.

<sup>4</sup> 35 App. D. C. 372; 227 U. S. 80, 33 Sup. Ct. 197, 57 L. Ed. —.

the corporation and the other parties interested. The promoters were required to refund to the corporation the secret cash profit of \$15,000, as well as to surrender the shares of stock thus received. The court in its opinion characterized the acts of the promoters in the following language:

§ 41. "Instead of acting in good faith, as their fiduciary relation especially demanded, they deceived and defrauded complainant, by requiring it to pay \$35,000 for property which had really cost but \$20,000. Instead of advancing in good faith the pro rata amounts required of them in the legitimate prosecution of the enterprise, they advanced nothing, and, by the before-mentioned fraudulent methods, obtained assessable stock of the complainant. This the court has rightly ordered canceled. Can it be possible that equity demands that the promoters' stock, which these men procured under the conditions mentioned, and which is now in the possession of one of the guilty parties, and burdened with all the evidences of the fraud, should escape the condemnation of the court? As we view this record, the fraud of these parties taints the entire proceeding. There never was a moment, according to the record, when they really intended to invest a dollar in the enterprise. To be sure, they devoted some time to the project; but their good faith was at no time apparent. The theory upon which the assessable stock has been ordered to be surrendered and canceled is that it represents secret profits derived from the complainant. What does the promoters' stock now in the hands of Davis represent? It was acquired upon the theory that the members of the syndicate, having in good faith devoted their time and invested their money in inaugurating and prosecuting the enterprise, were entitled to special consideration by reason thereof. Instead of acting in good faith, the defendants practiced deceit upon the complainant, which, we think, is of such a nature, and so closely related to the question now under consideration, as not to justify a court of equity in distinguishing between the two kinds of stock. Of course, it was necessary for some one, if this property was to

be acquired, to furnish the money. The defendants not only did not furnish any, but in addition to all the stock which they acquired there still remains in their hands over \$15,000 secret profits. Can it be that such a betrayal of trust should be rewarded by recognizing the validity of the promoters' stock thus acquired? Can it be that in a court of equity such gross breach of trust as these men have been guilty of is to be rewarded to such an extent? The assessable stock which has been ordered canceled represented the fruits of a fraudulent conception, and yet, but for the fraud practiced upon the complainant, the defendants would not have received the promoters' stock. It is evident that they received that stock because it was then supposed that they were honestly acting in the interests of the complainant, and assuming their share of the burdens arising. Had it been known that they were not acting in good faith, and that they were not investing a dollar in the enterprise, it is evident that they would have received no promoters' stock, for they had earned none."

§ 42. Inasmuch as a promoter occupies towards his company a fiduciary relation, he is required, like other trustees, to tell all the material facts to his associates; one of the most material facts, of course, being the cost of the properties which the corporation is to acquire.<sup>5</sup> Where there is a full dis-

<sup>5</sup> See *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423, the remarks in which made by the court on the subject of promoters were subsequently said by the Supreme Court to have been merely obiter (*Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025); *Emma Silver Min. Co. v. Park*, Fed. Cas. No. 4,467 [14 Blatchf. 411]; *Yeiser v. United States Board & Paper Co.*, 107 Fed. 340, 46 C. C. A. 567, 52 L. R. A. 724; *Central Trust Co. of New York v. East Tennessee Land Co.* (C. C.) 116 Fed. 743; *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Scholfield Gear & Pulley Co. v. Scholfield*, 71 Conn. 1, 40 Atl. 1046; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523; *Old Dominion Copper Min. & Smelting Co. v. Bigelow*, 188 Mass. 315, 74 N. E. 653, 108 Am. St. Rep. 479; *Fred Macey Co. v. Macey*, 143

closure, the mere fact that the promoters sell property to the corporation at a profit will not entitle it to file a bill to rescind the transaction; the reason for this being that there has been no fraud.<sup>6</sup> So, too, it is perfectly legal for a person who has originally purchased property without any intention to sell it to a corporation in which he is interested, the purchase being made at a time when it was not his duty to act for the company in the matter, to subsequently sell to the corporation at a fair price, even though this is greater than what he paid for it;<sup>7</sup> and he may do this without disclosing his profit.<sup>8</sup>

### § 43. Liability of Promoters to Stockholders.

Under much the same circumstances as would disclose a liability in favor of the corporation,<sup>9</sup> a stockholder who was induced by the promoter to purchase stock, and thereby sustained a loss, may recover from the promoter the amount paid

Mich. 138, 106 N. W. 722, 5 L. R. A. (N. S.) 1036; *Cook v. Southern Columbian Climber Co.*, 75 Miss. 121, 21 South. 795; *South Joplin Land Co. v. Case*, 104 Mo. 572, 16 S. W. 390; *Exter v. Sawyer*, 146 Mo. 302, 47 S. W. 951; *Woodbury Heights Land Co. v. Loudenslager*, 55 N. J. Eq. 78, 35 Atl. 436; *Brewster v. Hatch*, 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498; *Richlands Oil Co. v. Morriss*, 108 Va. 288, 61 S. E. 762; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, 66 N. W. 399, 53 Am. St. Rep. 917; *Limited Inv. Ass'n v. Glendale Inv. Ass'n*, 99 Wis. 54, 74 N. W. 633; *First Ave. Land Co. v. Hildebrand*, 103 Wis. 530, 79 N. W. 753; *In re Hess Mfg. Co.*, 23 S. C. Can. 644; *Hichens v. Congreve*, 4 Russ. 562; *Mann v. Edinburgh Northern Tramways Co.*, [1893] A. C. 69; *Erlanger v. New Sombrero Phosphate Co.*, L. R. 3 App. Cas. 1218.

<sup>6</sup> *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025; *Stewart v. St. Louis, Ft. S. & W. R. Co. (C. C.)* 41 Fed. 736.

<sup>7</sup> *Parker v. Nickerson*, 137 Mass. 487.

<sup>8</sup> *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, 54 Atl. 254.

<sup>9</sup> See *supra*, §§ 40-42.

for his stock;<sup>10</sup> and it has been held that stockholders may, if they choose, recover the promoter's profits in the transaction, although the property is actually worth the amount paid by the corporation.<sup>11</sup> The fact that some of the promoters are innocent of any wrong will not protect them from liability, where they are jointly interested in forwarding the enterprise, and their associates or agents in the promotion of the scheme make false representations as to material facts within the knowledge of all, or fraudulently conceal such facts, and as a result the innocent parties receive benefits.<sup>12</sup> In order to protect themselves from subsequent liability for what would otherwise be considered fraudulent acts, promoters sometimes insert in the subscription agreement a provision waiving notice of all contracts between promoters and the company. But it has been held in England that, if such a waiver is in itself fraudulent, the stockholders will not be bound by it.<sup>13</sup>

#### § 44. Liability of Promoters to Third Persons.

In organizing a corporation, it is generally necessary, prior to incorporation, to have certain preliminary work performed. This may necessitate the employment of clerks, engineers, or attorneys. Whether the corporation subsequently created will

<sup>10</sup> *Ex-Mission Land & Water Co. v. Flash*, 97 Cal. 610, 32 Pac. 600; *Getty v. Devlin*, 54 N. Y. 403; *Id.*, 70 N. Y. 504; *Brewster v. Hatch*, 10 Abb. N. C. (N. Y.) 400, affirmed 122 N. Y. 349, 25 N. E. 505, 19 Am. St. Rep. 498; *Short v. Stevenson*, 63 Pa. 95; *Hebgen v. Koeffler*, 97 Wis. 313, 72 N. W. 745.

<sup>11</sup> *Burbank v. Dennis*, 101 Cal. 90, 35 Pac. 444; *Hayden v. Green*, 66 Kan. 204, 71 Pac. 236; *Appeal of McElhenny*, 61 Pa. (11 P. F. Smith) 188; *Simons v. Vulcan Oil & Mining Co.*, 61 Pa. (11 P. F. Smith) 202, 100 Am. Dec. 628.

<sup>12</sup> *Hornblower v. Crandall*, 78 Mo. 581; *Walker v. Anglo-American Mortgage & Trust Co.*, 72 Hun, 334, 341, 25 N. Y. Supp. 432; *Downey v. Finucane et al.*, 205 N. Y. 251, 98 N. E. 391, 40 L. R. A. (N. S.) 307.

<sup>13</sup> *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421.

be bound by contracts for such services will be discussed later.<sup>14</sup> Generally speaking, whether the corporation is liable or not, the promoters themselves are personally liable to those whose services have been engaged.<sup>15</sup> Upon the same principle, the English courts have decided that a subscriber to stock in a corporation, the organization of which has failed, and who has paid money to the promoters on account of his subscription, may recover from them the amount so paid, and that, if he himself was not engaged in advancing the enterprise, he is not liable for any portion of the preliminary expenses.<sup>16</sup> But if the person, who might otherwise hold the promoters, allows the account to be transferred to the corporation, and then enters into a long course of dealing with it, all of which appears upon the running account, this may con-

<sup>14</sup> See *infra*, § 48.

<sup>15</sup> *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; *Parsons v. Spooner*, 5 Hare, 102; *American Paper Bag Co. v. Van Nortwick*, 52 Fed. 752, 3 C. C. A. 274; *Ijams v. Andrews*, 151 Fed. 725, 81 C. C. A. 109; *Hersey v. Tully*, 8 Colo. App. 110, 44 Pac. 854; *Pratt v. Finkle*, 99 Ga. 616, 25 S. E. 941; *Whetstone v. Crane Bros. Mfg. Co.*, 1 Kan. App. 320, 41 Pac. 211; *Friedman v. Janssen*, 23 Ky. Law Rep. 2151, 66 S. W. 752; *Chaffe v. Ludeling*, 27 La. Ann. 607; *Queen City Furniture & Carpet Co. v. Crawford*, 127 Mo. 356, 30 S. W. 163; *Henderson Woolen Mills v. Edwards*, 84 Mo. App. 448; *Hub Pub. Co. v. Richardson*, 59 Hun, 626, 13 N. Y. Supp. 665; *Babbitt v. Gibbs*, 150 N. Y. 281, 44 N. E. 952; *McClure v. Central Trust Co. of New York*, 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153; *McVicker v. Cone*, 21 Or. 353, 28 Pac. 76; *McFall v. McKeesport & Y. Ice Co.*, 123 Pa. 259, 16 Atl. 478; *Ennis Cotton Oil Co. v. Burks* (Tex. Civ. App. 1897) 39 S. W. 966; *Bergeron v. Hobbs*, 96 Wis. 641, 71 N. W. 1056, 65 Am. St. Rep. 85; *Sandusky Coal Co. v. Walker*, 27 Ont. (Can.) 677; *Scott v. Ebury*, L. R. 2 C. P. 255; *Kelner v. Baxter*, L. R. 2 C. P. 174; *Hopcroft v. Parker*, 16 L. T. Rep. 561; *Kerridge v. Hesse*, 9 Car. & P. 200; *Bell v. Francis*, 9 Car. & P. 66; *Collingwood v. Berkeley*, 15 C. B. (N. S.) 145. See *infra*, § 48.

<sup>16</sup> *Ashpitel v. Sercombe*, 5 Exch. 147; *Nockels v. Crosby*, 3 B. & C. 814.

stitute a complete novation, and release the promoters, and make the company liable.<sup>17</sup>

#### § 45. Liability of Promoters as Among Themselves.

When one promoter has been obliged to pay a third person for services contracted for in advance of the organization of the corporation, he may recover of his copromoters their proportionate share of the amount so paid.<sup>18</sup> Each promoter is entitled to receive the amount of stock which under the contract was due him, and, if he does not receive it, the courts will compel the proper distribution.<sup>19</sup> Wherever there is a clear legal contract between promoters, and such contract is broken, the party injured by the breach may recover damages in consequence.<sup>20</sup>

#### § 46. Rights of Promoters as Against Corporation.

It is a general rule that a corporation is not liable to its promoters for services performed and expenses incurred by them prior to organization,<sup>21</sup> though, if it adopts the benefit of the

<sup>17</sup> Case Mfg. Co. v. Soxman, 138 U. S. 431, 11 Sup. Ct. 360, 34 L. Ed. 1019; In re Heckman's Estate, 172 Pa. 185, 33 Atl. 552; Shields v. Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 668, 26 L. R. A. 509, 45 Am. St. Rep. 700; Ennis Cotton Oil Co. v. Burks (Tex. Civ. App. 1897) 39 S. W. 966; Whitwell v. Warner, 20 Vt. 425. See *infra*, § 48.

<sup>18</sup> Boulter v. Peplow, 9 C. B. 493; Lucas v. Beach, 1 Man. & Gr. 417; Spottiswoode's Case, 6 De G., M. & G. 345; Batard v. Hawes, 2 El. & B. 287; Hamilton v. Smith, 5 Jur. (N. S.) pt. 1, 32; Lefroy v. Gore, 1 Jones & La T. 571; Edger v. Knapp, 7 Jur. pt. 1, 583.

<sup>19</sup> Bates v. Wilson, 14 Colo. 140, 24 Pac. 99; Hunter Smokeless Powder Co. v. Hunter, 91 N. Y. Supp. 620, 100 App. Div. 191; Meads v. Walker, Hopk. Ch. (N. Y.) 587.

<sup>20</sup> Krohn v. Williamson (C. C.) 62 Fed. 869, affirmed in Williamson v. Krohn, 66 Fed. 655, 13 C. C. A. 668; Harvey v. Sellers (C. C.) 115 Fed. 757; Mosier v. Parry, 60 Ohio St. 388, 54 N. E. 364; Sims v. Tyrer (1897) 96 Va. 5, 26 S. E. 508.

<sup>21</sup> New York & N. H. R. Co. v. Ketchum, 27 Conn. 170; Newport & M. R. Co. v. Hay, 8 Ky. Law Rep. 115; Bell's Gap R. R. v. Christy,

services and ratifies the employment, the corporation is bound.<sup>22</sup>

### § 47. Rights of Promoters Against Third Persons.

Where a contract is made in the name and for the benefit of a projected corporation, an action for its breach may be brought in the name of the promoters who are parties to it.<sup>23</sup>

### § 48. Liability of Corporation for Promoters' Acts.

Unless subsequently ratified, a contract entered into by promoters or incorporators does not bind their corporation.<sup>24</sup>

79 Pa. 54, 21 Am. Rep. 39; *Wilson v. Trenton Pass Ry. Co.*, 56 N. J. Eq. 783, 40 Atl. 597; *Security Co. v. Bennington Monument Ass'n*, 70 Vt. 201, 40 Atl. 43.

<sup>22</sup> *Arapahoe Inv. Co. v. Platt*, 5 Colo. App. 515, 39 Pac. 584; *Low v. Connecticut & P. R. R. Co.*, 45 N. H. 370; *Weatherford M. W. & N. W. R. Co. v. Granger* (Tex. Civ. App.) 22 S. W. 70.

<sup>23</sup> *Abbott v. Hapgood*, 150 Mass. 248, 22 N. E. 907, 5 L. R. A. 586, 15 Am. St. Rep. 193; *Drummond v. Crane*, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460.

<sup>24</sup> *Summerlin v. Fronteriza Silver Min. & Mill. Co.* (C. C.) 41 Fed. 249; *Winters v. Hub Mining Co.* (C. C.) 57 Fed. 287; *Moore & Handley Hardware Co. v. Towers Hardware Co.*, 87 Ala. 206, 6 South. 41, 13 Am. St. Rep. 23; *Morrison v. Gold Mountain Gold Mining Co.*, 52 Cal. 306; *New York & N. H. R. Co. v. Ketchum*, 27 Conn. 170; *Carey v. Des Moines Co-Op. Coal & Mining Co.*, 81 Iowa, 674, 47 N. W. 882; *Safety Deposit Life Ins. Co. v. Smith*, 65 Ill. 309; *Western Screw & Mfg. Co. v. Cousley*, 72 Ill. 531; *Gent v. Manufacturers' & Merchants' Mut. Life Ins. Co.*, 107 Ill. 652; *Park v. Modern Woodmen of America*, 181 Ill. 214, 54 N. E. 932; *Davis & Rankin Bldg. & Mfg. Co. v. Hillsboro Creamery Co.*, 10 Ind. App. 42, 37 N. E. 549; *Marchand v. Loan & Pledge Ass'n*, 26 La. Ann. 389; *Franklin Fire Ins. Co. v. Hart*, 31 Md. 59; *Koppel v. Massachusetts Brick Co.*, 192 Mass. 223, 78 N. E. 128; *Bank of Forest v. Orgill Bros. & Co.*, 82 Miss. 81, 34 South. 325; *Hill v. Gould*, 129 Mo. 106, 30 S. W. 181; *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440; *Davis v. Ravenna Creamery Co.*, 48 Neb. 471, 67 N. W. 436; *Central Park*

The mere fact that the promoters subsequently become trustees does not change this rule.<sup>25</sup> In order to recover in an action at law against a corporation for services rendered before its charter was granted, plaintiff must show, either an express promise of the new company, or that the contract was made with persons then engaged in its formation and taking steps preliminary thereto, and that it was made on behalf of the new company, in the expectation on the part of the plaintiff, and with the assurance on the part of the projectors, that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it.<sup>26</sup> Under these conditions, a complete ratification being proved, the company may be made liable,<sup>27</sup> as it is only reasonable to hold that, when a corporation accepts the benefits of a promoter's con-

*Fire Ins. Co. v. Callaghan*, 41 Barb. (N. Y.) 448; *Munson v. Syracuse, G. & C. R. Co.*, 103 N. Y. 58, 8 N. E. 355; *Tift v. Quaker City Nat. Bank*, 141 Pa. 550, 21 Atl. 660; *Bash v. Culver Gold Min. Co.*, 7 Wash. 122, 34 Pac. 462; *Buffington v. Bardon*, 80 Wis. 635, 50 N. W. 776; *Company of Proprietors of Leominster Canal Navigation v. Shrewsbury, etc., Ry. Co.*, 3 K. & J. 654; *Aldred v. North Midland Ry. Co.*, 1 Ry. & Canal Cas. 404.

<sup>25</sup> *Berridge v. Abernathy*, 24 N. Y. Wkly. Dig. 513.

<sup>26</sup> *Little Rock & Ft. S. R. Co. v. Perry*, 37 Ark. 164.

<sup>27</sup> *North American Loan & Trust Co. v. Colonial & United States Mortgage Co.*, 83 Fed. 796, 28 C. C. A. 88; *Davis v. Montgomery Furnace & Chemical Co.*, 101 Ala. 127, 8 South. 496; *Stanton v. New York & E. Ry. Co.*, 59 Conn. 272, 22 Atl. 300, 21 Am. St. Rep. 110; *Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Mfg. Co.*, 106 Ga. 84, 31 S. E. 809; *Streator Independent Telephone Co. v. Continental Telephone Const. Co.*, 217 Ill. 517, 75 N. E. 546, affirming judgment 118 Ill. App. 14; *Farmers' Bank of Vine Grove v. Smith*, 20 Ky. Law Rep. 1637, 105 Ky. 816, 49 S. W. 810, 88 Am. St. Rep. 341; *Esper v. Miller*, 131 Mich. 334, 91 N. W. 613; *McArthur v. Times Print. Co.*, 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653; *Pitts v. D. M. Steele Mercantile Co.*, 75 Mo. App. 221; *Wilson v. Kings County Elevated R. Co.*, 114 N. Y. 487, 21 N. E. 1015; *Pittsburg & T. Copper Mining Co. v. Quintrell*, 91 Tenn. 693, 20 S. W. 248; *McDonough v. First*

tract, it must bear the burdens.<sup>28</sup> The cases are unanimous in holding that a corporation is liable for the fees and expenses incurred by an attorney who prepared the necessary papers leading up to the incorporation of the company and supervised its organization. In such a case the corporation must of necessity ratify and accept the services thus rendered.<sup>29</sup>

#### § 49. Rights of Corporation on Account of Promoters' Acts.

When a corporation adopts or ratifies a contract made on its behalf by promoters, with the knowledge of the other contracting party that it was to be for the benefit of the company, it may enforce it by a suit in its own name.<sup>30</sup>

#### § 50. Agreements for Future Management.

The New York courts have held that it is legal for persons, when organizing a corporation, to provide for its future man-

Nat. Bank of Houston, 34 Tex. 309; *Browning v. Great Central Mining Co. of Devon*, 5 H. & N. 856.

<sup>28</sup> *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050; *Chicago Bldg. & Mfg. Co. v. Talbotton Creamery & Manufacturing Co.*, 106 Ga. 84, 31 S. E. 809; *Grape Sugar & Vinegar Mfg. Co. of Baltimore v. Small*, 40 Md. 395; *Bommer v. American Spiral Spring Butt Hinge Mfg. Co.*, 81 N. Y. 468; *Rogers v. New York & T. Land Co.*, 134 N. Y. 197, 211, 32 N. E. 27; *Seymour v. Spring Forest Cemetery Ass'n*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; *Id.*, 157 N. Y. 697, 51 N. E. 1094; *Kaeppler v. Redfield Creamery Co.*, 12 S. D. 483, 81 N. W. 907; *Weatherford M. W. & N. W. Ry. Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837; *Lancaster Gin & Compress Co. v. Murray Ginning System Co.*, 19 Tex. Civ. App. 110, 47 S. W. 387; *Wall v. Niagara Mining & Smelting Co.*, 20 Utah, 474, 59 Pac. 399; *Spiller v. Paris Skating Rink Co.*, L. R. 7 Ch. Div. 368.

<sup>29</sup> *Freeman Improvement Co. v. Osborn*, 14 Colo. App. 488, 60 Pac. 730; *Taussig v. St. Louis & K. R. Co.*, 166 Mo. 28, 65 S. W. 969, 89 Am. St. Rep. 674; *City Building Ass'n No. 2 v. Zahner*, 6 Ohio Dec. 1068, 6 Wkly. Law Bul. 389, 10 Rec. 181.

<sup>30</sup> *Bedford, etc., Ry. Co. v. Stanley*, 2 J. & H. 746.

agement and control, and that as between the parties so agreeing the courts will enforce the contractual rights.<sup>31</sup>

### § 51. Promoters' Contracts.

The forms of promoters' contracts must vary, of course, very greatly, depending upon the circumstances of each particular case. The form here inserted, therefore, can serve only as a very general guide in the preparation of such agreements. It contains provisions which were approved by the Court of Appeals of New York in the case last above alluded to.<sup>31</sup>

### § 52. Form of Promoters' Contract.

This agreement, made and entered into this ..... day of ....., A. D. ....., by and between John Doe, of the city and state of New York, party of the first part, Richard Roe, of the city of Philadelphia, in the state of Pennsylvania, party of the second part, and J. Mearpont Porgan, of Trenton, in the state of New Jersey, party of the third part, witnesseth:

The parties hereto, in consideration of the mutual covenants herein contained, and of the sum of ten (\$10.00) dollars by each to the other in hand paid, the receipt of which is hereby acknowledged, hereby agree:

First. A corporation shall be immediately organized under the laws of the state of New York by the parties hereto and by such of their associates as may, by signing a stock subscription agreement, evidence their desire to become interested in such corporation.

(a) The name of such corporation is to be the Mercantile Exchange, Incorporated. If it shall be desired to select some other name, that may be done by the unanimous consent of the parties hereto.

(b) The object of such corporation shall be to establish and conduct a department store, with any and all powers usually possessed by corporations of such character.

(c) Said corporation shall have a capital stock of four hundred thousand (\$400,000.00) dollars, to be divided into 3,000 shares of common stock and 1,000 shares of preferred stock, of the par value of one hundred (\$100.00) dollars each.

(d) The owners of the preferred stock shall be entitled to receive, and the corporation shall be bound to pay, out of its surplus or net

<sup>31</sup> King v. Barnes, 109 N. Y. 267, 16 N. E. 332.

earnings, a cumulative dividend at the rate of not exceeding 7% per annum, before any dividend shall be set apart or paid on the common stock. Said preferred stock may, by vote of a majority of the board of directors, be redeemed at any time after three (3) years from the time of its issuance at the price of \$.... per share and accumulated dividends. In case of liquidation, or dissolution, or distribution of the assets of the company, the owners of preferred stock shall be paid the par value of their preferred shares, and the amount of dividends accumulated and unpaid thereon, before any amount shall be distributed among the owners of the common stock, and, after the payment of the par value of the common stock to the owners thereof, the balance of the assets and funds shall be distributed ratably among all the stockholders without preference.

Second. It is hereby agreed that the parties of the first and second parts shall each contribute the sum of \$150,000, for which they shall, upon the organization of the corporation hereinabove mentioned, receive stock as hereinafter recited, said sums to be paid over by them within five days from the date hereof to the party of the third part, who shall apply the same towards the purchase of certain real estate located at the corner of Broadway and Canal streets, New York City, specifically described as follows:

[Insert description.]

Third. The title to said property shall be taken in the name of said party of the third part, who shall, immediately after the organization of said corporation, convey the title to said property to such corporation, to be held and used by it for its corporate purposes.

Fourth. The said party of the third part shall, during a period of 30 days from the date hereof, use his best efforts to secure subscriptions to the balance of the capital stock, both preferred and common, of such corporation, at par, with the exception of \$10,000 of said stock, to which the party of the third part shall be entitled for valuable services performed by him in organizing such corporation. The parties of the first and second parts hereto agree to contribute in equal proportions such additional sums as at the expiration of said 30 days shall not have been obtained from other subscribers, so that at the expiration of said 30 days the entire authorized capital may have been fully subscribed.

Fifth. Immediately upon the organization of the said corporation, a board of directors is to be elected, to consist of the said party of the third part and two other persons, to be selected by him, who shall serve as the directors for the first year, or until their resignations are sooner requested by the parties of the first and second

parts. Whenever the said parties of the first and second parts shall request the resignations of the two persons to be selected by the said party of the third part as aforesaid, they shall immediately resign, and the nominees of the parties of the first and second parts shall be immediately elected in their place.

Sixth. The capital stock of such corporation shall be issued to the following persons, or their respective assigns, in the amounts hereinafter set opposite their respective names, to wit:

	Preferred.	Common.
John Doe.....	375 shares	1125 shares
Richard Roe.....	375 "	1125 "
J. Mearpont Porgan.....	50 "	50 "

Stock shall also be issued to the other subscribers in the amounts respectively subscribed by them. In case any part of the balance shall not have been subscribed by the expiration of 30 days from the date hereof, then the remaining stock not so subscribed shall be issued in equal proportions to the parties of the first and second parts hereto. From the stock to be delivered to the party of the third part hereunder he shall procure a sufficient amount to be issued to the two directors to be named by him as aforesaid in order to qualify them as directors in said corporation.

Seventh. Any officers to be elected by the first board of directors shall resign at any time upon the request of the parties of the first and second parts hereto.

Eighth. It is also agreed that, in order to insure the performance of this contract according to its terms, the party of the third part will forthwith give a bond to the parties of the first and second parts in the sum of \$400,000, with the ..... Company as surety thereupon, and that the premium on said bond shall be paid by the parties of the first and second parts hereto in equal proportions.

In testimony whereof the said parties have hereunto signed their names and affixed their seals on the day and year first hereinabove written.

..... [Seal.]

..... [Seal.]

..... [Seal.]

### § 53. Underwriting Agreements.

In organizing a new corporation of any size, it is generally considered the safest policy to enlist the services of some well-known financial house, which will agree to take the entire issue of its stocks or bonds, or both, or some designated part of same, contracting to pay for them within a stipulated time

the price agreed upon. The underwriting syndicate then endeavors to sell these securities to the public at an advance. Of course, if the securities do not sell, the underwriters lose. On the other hand, if they do sell, the sale is usually at such a figure as to net large profits to the underwriters.

#### § 54. Form of Underwriting Agreement.

Below is appended a copy of the underwriting agreement entered into March 1, 1901, between J. P. Morgan & Co. and the United States Steel Corporation.<sup>32</sup>

#### § 55.

An agreement, made this first day of March, nineteen hundred and one, by and between United States Steel Corporation, a corporation existing under the laws of the state of New Jersey (hereinafter called the "Steel Company"), party of the first part, and J. P. Morgan & Co., of the city of New York, acting in behalf of a syndicate, party of the second part:

Whereas, the Steel Company has been organized with a capital of \$3,000, of which one-half is 7% cumulative preferred stock and one-half is common stock, as shown by the certificate of incorporation of the Steel Company, recorded in Hudson county, New Jersey, on the 25th day of February, 1901, which capital stock is to be increased as hereinafter provided; and

Whereas, as hereinafter stated, the board of directors of the Steel Company deem it necessary for its business now to acquire the stocks and bonds of certain other corporations and also to obtain for its corporate purposes a certain sum in cash; and

Whereas, after careful investigation and appraisal, the board of directors of the Steel Company has ascertained, adjudged and determined that the value of such bonds and stocks now so to be acquired and hereinafter specified, exclusive of such cash sum (which cash sum is to be received and treated by the Steel Company as surplus), is equal at least to the par value of the stock of the Steel Company and of the bonds of the Steel Company to be issued therefor; and

Whereas, the board of directors of the Steel Company considers that such bonds, stocks and cash may best be obtained by purchase,

<sup>32</sup> Report of Commissioner of Corporations on the Steel Industry, July 1, 1911, p. 383, Exhibit 1.

on the terms hereinafter stated, from the syndicate represented by Messrs. J. P. Morgan & Co., party of the second part hereto, and managers of the said syndicate; and

Whereas, each of the corporations, the capital stock of which it is proposed now to acquire hereunder, has been organized and now is existing under the laws of the state of New Jersey, and has outstanding capital stock divided into shares each of the par value of \$100 (excepting the Carnegie Company, of which the capital stock is divided into shares of the par value of \$1,000), and divided, also, into classes as next hereinafter stated, the said corporations, and the total outstanding capital stock and the classes thereof, being as follows, to wit:

Name of Corporation.	Total Outstanding Capital Stock.	
	Preferred.	Common.
American Sheet Steel Company.....	\$24,500,000	\$24,500,000
American Steel Hoop Company.....	14,000,000	19,000,000
American Steel and Wire Company.....	40,000,000	50,000,000
American Tin Plate Company.....	18,325,000	28,000,000
Carnegie Company .....		160,000,000
Federal Steel Company.....	53,260,900	46,484,300
National Steel Company.....	27,000,000	32,000,000
National Tube Company.....	40,000,000	40,000,000

And whereas, the Carnegie Company has issued, and there are now outstanding, its 5% bonds for the aggregate principal sum of \$160,000,000; and

Whereas, the syndicate has arranged for the acquisition of substantially all of the bonds and the stock of the Carnegie Company; and

Whereas, in reliance upon this contract the syndicate is endeavoring to effect the acquisition, and the delivery of all of the bonds of the Carnegie Company, and all of the outstanding shares of the capital stock of all of said corporations, upon the terms herein provided:

Now, therefore, in consideration of the premises and of other good and valuable considerations, and of the efforts and expenses which both parties recognize will have to be made and incurred by the syndicate in their endeavor to consummate such sale:

First. The Steel Company agrees with J. P. Morgan & Co., acting in behalf of the syndicate, as follows:

(1) If, on or before May 31, 1901, J. P. Morgan & Co. in behalf of the syndicate shall

(a) Sell and deliver, or cause to be sold and delivered, to the Steel Company, at least fifty-one per cent. of such outstanding shares of the capital stock of each of the corporations above named, or of such of said corporations as finally shall be embraced within the operation of this agreement with the approval of the Steel Company, which fifty-one per cent. of the total outstanding capital stock of each of such corporations shall include not less than fifty-one per cent. of the total outstanding preferred stock, if any, of such company, and also all of the \$160,000,000 of bonds of the Carnegie Company now outstanding, or such lesser amount thereof as shall be tendered by J. P. Morgan & Co.; and

(b) Shall pay, or shall cause to be paid, to the Steel Company twenty-five million dollars in cash:

(2) The Steel Company will purchase such shares and bonds, and, in payment and consideration for such stock and bonds and for such cash, will issue to such persons as J. P. Morgan & Co., in behalf of the syndicate, shall indicate, shares of its preferred stock and shares of its common stock (all of which shall be fully paid and non-assessable), and also its five per cent. gold bonds (which bonds shall be of such form and tenor, and shall be secured, as J. P. Morgan & Co. may determine), as follows:

(a) In the event that the Steel Company shall acquire all the shares of the capital stock of all of such other corporations and all such bonds of the Carnegie Company, the Steel Company will issue for all such stock, and such bonds, and such sum in cash, four million two hundred and forty-nine thousand nine hundred and eighty-five shares of its preferred stock, and four million two hundred and forty-nine thousand nine hundred and eighty-five shares of its common stock, and also three hundred and four million dollars of its said five per cent. gold bonds.

(b) In the event that the Steel Company shall not acquire all the shares of the capital stock of all of such other corporations and all such bonds of the Carnegie Company, the Steel Company will issue for the shares of stock and the bonds which shall be acquired, and said sum in cash, four million two hundred and forty-nine thousand nine hundred and eighty-five (4,249,985) shares of its preferred stock, and four million two hundred and forty-nine thousand nine hundred and eighty-five (4,249,985) shares of its common stock, and three hundred and four million dollars (\$304,000,000) of its five per cent. gold bonds, less abatement and deduction therefrom to be made as follows:

For each \$100 par value of stock of such other companies mentioned in the following table, which shall not be acquired by the Steel Company, the amount of the preferred stock and common stock, or either set opposite to such class of stock in said table shall be deducted and abated.

Name of Company and Class of Stock.	Amount of Stock to be Deducted in Par Value.		Name of Company and Class of Stock.	Amount of Stock to be Deducted in Par Value.	
	Preferred Stock.	Common Stock.		Preferred Stock.	Common Stock.
Carnegie Company....	\$150.00	\$150.00	American Tin Plate Co.:		
Federal Steel Co.:			Preferred stock....	\$125.00	.....
Preferred stock....	110.00	.....	Common stock....	20.00	\$125.00
Common stock....	4.00	107.50	American Steel Hoop Co.:		
American Steel and Wire Co. of N. J.:			Preferred stock....	100.00	.....
Preferred stock....	117.50	.....	Common stock....	.....	100.00
Common stock....	.....	102.50	American Sheet Steel Co.:		
National Tube Co.:			Preferred stock....	100.00	.....
Preferred stock....	125.00	.....	Common stock....	.....	100.00
Common stock....	8.80	125.00			
National Steel Co.:					
Preferred stock....	125.00	.....			
Common stock....	.....	125.00			

For each \$1,000 par value of such bonds of the Carnegie Company that shall not be acquired by the Steel Company \$1,000 par value of such bonds of the Steel Company shall be abated and deducted.

Second. The Steel Company further agrees that in the event of the acquisition by it pursuant to this agreement of less than the total issue of said bonds of the Carnegie Company or less than the total outstanding capital stock of each of said corporations, the Steel Company from time to time will purchase, from such persons as shall be indicated by J. P. Morgan & Co., any and all additional outstanding bonds of the Carnegie Company or shares of the capital stock of any said corporations that shall be tendered to the Steel Company prior to May 1, 1902, and in payment therefor will issue and deliver its bonds and fully paid-up shares of its preferred stock and fully paid-up shares of its common stock, at the rates at which deduction and abatement shall have been made under article

first hereof in respect of the additional bonds and shares of stock so purchased.

Third. The Steel Company shall credit and allow to J. P. Morgan & Co. on account of the cash sum payable under article first hereof, or shall pay to J. P. Morgan & Co. a sum equal to the aggregate amount which, prior to April 1, 1901, shall have accrued upon any installments of dividends accruing, but not matured, on any such preferred stock at the date of delivery thereof to the Steel Company.

The Steel Company further agrees that the dividends on all the preferred stock of the Steel Company, to be issued by it hereunder, shall begin to accrue from April 1, 1901.

Fourth. The Steel Company, without prejudice to the further exercise of its chartered rights to increase or to decrease its capital stock, agrees that it will lawfully increase its authorized capital stock to an amount sufficient to enable it to issue and to deliver its preferred stock and its common stock to the aggregate amount hereinbefore provided.

Fifth. J. P. Morgan & Co., in behalf of the syndicate, will bear and will pay the statutory fees and taxes for the proposed increase of the capital stock of the Steel Company.

Sixth. This agreement, and any agreement in pursuance thereof, is and shall be strictly *inter partes*; and no stockholder of any of the corporations above referred to shall be deemed to have any right hereunder.

In witness whereof, these presents have been duly executed by the parties hereto the day and year first above written.

United States Steel Corporation,

By W. J. Curtis, President.

[L. S.]

Attest: Charles MacVeagh,

Secretary J. P. Morgan & Co.

## CHAPTER V

## SUBSCRIPTIONS FOR STOCK

- § 56. Necessity for Formal Subscription Agreement.
- 57. Requisites of Subscription Agreement.
- 59. Uncertainty in Subscription Agreement.
- 60. Right to Withdraw.
- 63. Right to Assign Subscriptions.
- 64. Oversubscription.
- 65. Form of Subscription Agreement.
- 66. Agreement for Future Subscription.

## § 56. Necessity for Formal Subscription Agreement.

A formal subscription agreement is not usually necessary, except in those states whose statutes require it as an essential step preliminary to the certificate of incorporation.<sup>1</sup> Where a statute requires that, before incorporation, all the capital stock shall have been subscribed,<sup>2</sup> it is customary for the officers charged with the duty of receiving certificates of incorporation to insist upon evidence by the subscription agreement to satisfy them that all the capital stock has actually been subscribed. The statute sometimes provides for commissioners whose duty it shall be to open books for subscriptions and to receive them in that manner. It is undoubtedly the safest plan, in states having such enactments, to comply pretty strictly with the letter of the law,<sup>3</sup> although it has been held that a subscription taken in some other way will be binding.<sup>4</sup>

<sup>1</sup> *Parkhurst v. Mexican S. E. R. Co.*, 102 Ill. App. 507; *Somerset Nat. Banking Co.'s Receiver v. Adams*, 24 Ky. Law Rep. 2083, 72 S. W. 1125; *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461; *Davies v. Ball*, 64 Wash. 292, 116 Pac. 833.

<sup>2</sup> Act Feb. 4, 1905, c. 299, 33 Stat. 689 (District of Columbia).

<sup>3</sup> *Shurtz v. Schoolcraft & T. R. R. Co.*, 9 Mich. 269; *Parker v. Northern Cent. M. R. Co.*, 33 Mich. 23.

<sup>4</sup> *Northeastern R. Co. v. Rodrigues*, 10 Rich. (S. C.) 278.

**§ 57. Requisites of Subscription Agreement.**

When a subscription agreement is requisite, some care should be exercised in its preparation, because it is quite easy to draft a document of this kind, which will not stand the test of judicial scrutiny. In view of the diversity of opinion as to the binding force of an ordinary subscription agreement,<sup>5</sup> and in order to prevent the possibility of a subscriber withdrawing prior to the organization of the company, it is better to have the agreement signed also by the promoters, with a covenant to endeavor to obtain subscriptions up to a certain amount, and to organize the corporation as speedily as possible, and, when organized, to deliver to the subscribers stock in the company to the amount subscribed, in which event their promise would constitute a consideration for the promise of each of the subscribers.<sup>6</sup>

§ 58. In case the corporation has already been organized, and is thus legally competent to contract, a mere subscription agreement, without any covenant upon the part of the company, if under seal, would be valid in those jurisdictions where the common-law distinction between sealed and unsealed instruments prevails.<sup>7</sup>

**§ 59. Uncertainty in Subscription Agreement.**

In this connection attention should be called to a defect common to many subscription agreements otherwise beyond criticism. This consists in the failure to have them recite the par value of the stock for which the subscription is made. Frequently such documents contain a promise to subscribe for a certain number of the shares of the capital stock of a given corporation with a stated capital, without specifying into how many shares that capital is to be divided or the par value of

<sup>5</sup> See *infra*, § 60.

<sup>6</sup> *Audenried v. East Coast Milling Co.*, 68 N. J. Eq. 450, 59 Atl. 577; *Clark & M. Corp.* § 444.

<sup>7</sup> *Clark & M. Corp.* §§ 440, 451, *c.* and cases cited.

each share. Such a contract would, of course, be void for uncertainty, it being impossible to determine the extent of the subscription.<sup>8</sup> Prudence would dictate that all of the features of the proposed corporation which are considered of particular moment should be plainly stated in the subscription agreement.

### § 60. Right to Withdraw.

Where a corporation is organized pursuant to a subscription agreement, and none of the incorporators before organization has attempted to withdraw from his undertaking, the law is well settled that the company may hold a subscriber liable for the breach of his contract to pay for stock.<sup>9</sup> But when a subscriber, as is often the case, desires to abandon the enterprise before the corporation is actually formed, or when a prominent man, who has permitted his name to be used as a subscriber in order to induce others to become interested, gives notice of his intention to retire before organization, the question is presented as to his right to do so. Upon this subject the authorities are not in accord.

§ 61. An agreement whereby the subscribers indicate in writing their purpose to form a corporation, giving the necessa-

<sup>8</sup> *Loutsenhizer v. Farmers' & Merchants' Milling Co.*, 5 Colo. App. 479, 39 Pac. 66; *Nemaha Coal & Mining Co. v. Settle*, 54 Kan. 424, 38 Pac. 483; *Loewenberg v. De Voigne*, 145 Mo. App. 710, 123 S. W. 99; *Scott v. Gunnison*, 4 Brewst. (Pa.) 101.

<sup>9</sup> *Glenn v. Busey*, 5 Mackey (D. C.) 233, approved in *Glenn v. Marbury*, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790; *Marysville Electric Light & Power Co. v. Johnson*, 93 Cal. 538, 29 Pac. 126, 27 Am. St. Rep. 215; *Cross v. Pinckneyville Mill Co.*, 17 Ill. (7 Peck) 54; *Whitsitt v. Trustees of Pre-emption Presbyterian Church*, 110 Ill. 125; *Lackey v. Richmond & L. Turnpike Road Co.*, 56 Ky. (17 B. Mon.) 43; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Athol Music Hall Co. v. Carey*, 116 Mass. 471; *Security State Bank v. Raine*, 31 Neb. 517, 48 N. W. 262; *Ashuelot Boot & Shoe Co. v. Hoit*, 56 N. H. 548; *Dorris v. French*, 4 Hun (N. Y.) 292; *Id.*, 6 *Thomp. & C.* (N. Y.) 581.

ry features of such proposed company, each binding himself to take the number of shares set opposite their respective names, has been upheld in the following jurisdictions: Oklahoma,<sup>10</sup> New Hampshire,<sup>11</sup> Michigan,<sup>12</sup> North Carolina,<sup>13</sup> New Jersey,<sup>14</sup> Alabama,<sup>15</sup> Minnesota,<sup>16</sup> District of Columbia,<sup>17</sup> Indiana,<sup>18</sup> Maryland,<sup>19</sup> Wisconsin,<sup>20</sup> Vermont,<sup>21</sup> California,<sup>22</sup> Kentucky,<sup>23</sup> and Missouri.<sup>24</sup> In these jurisdictions the subscriber cannot withdraw even before organization, and of course not afterwards. The ground upon which these decisions is based is generally that the promise of each subscriber is the consideration for the promise of each of the others.

<sup>10</sup> Chicago Bldg. & Mfg. Co. v. Lyon, 10 Okl. 704, 64 Pac. 6.

<sup>11</sup> Ashuelot Boot & Shoe Co. v. Hoit, 56 N. H. 548.

<sup>12</sup> Peninsular Ry. Co. v. Duncan, 28 Mich. 130; Conrad v. La Rue, 52 Mich. 83, 17 N. W. 706.

<sup>13</sup> Wilmington & R. R. Co. v. Robeson, 27 N. C. (5 Ired.) 391.

<sup>14</sup> President, etc., of Bordentown S. A. Turnpike Co. v. Imlay, 4 N. J. Law (1 Southard) 285.

<sup>15</sup> Planters' & Merchants' Independent Packet Co. v. Webb, 156 Ala. 551, 46 South. 977, 16 Ann. Cas. 529.

<sup>16</sup> Minneapolis Threshing Mach. Co. v. Davis, 40 Minn. 110, 41 N. W. 1026, 3 L. R. A. 796, 12 Am. St. Rep. 701.

<sup>17</sup> Glenn v. Busey, 5 Mackey (D. C.) 233, approved in Glenn v. Marbury, 145 U. S. 499, 12 Sup. Ct. 914, 36 L. Ed. 790.

<sup>18</sup> Johnson v. Wabash & Mt. V. Plank-Road Co., 16 Ind. 389; Hight v. Trustees of Indiana Asbury University, 53 Ind. 326; Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981, 16 Am. St. Rep. 298.

<sup>19</sup> Hughes v. Antietam Mfg. Co. of Washington County, 34 Md. 316.

<sup>20</sup> Lathrop v. Knapp, 27 Wis. 214.

<sup>21</sup> Trustees of Troy Conference Academy v. Nelson, 24 Vt. 189.

<sup>22</sup> Christian College v. Hendley, 49 Cal. 347; Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

<sup>23</sup> Chicago Bldg. & Mfg. Co. v. Peterson, 133 Ky. 596, 118 S. W. 384; Same v. Beavan, Id.; Same v. Mahon, Id.

<sup>24</sup> Haskell v. Sells, 14 Mo. App. 91; Shelby County R. Co. v. Crow, 137 Mo. App. 461, 119 S. W. 435.

§ 62. In the following states subscribers before organization have been permitted to renounce their obligations before the company has taken any step or incurred any expense on the faith of such subscriptions, viz.: Maine,<sup>25</sup> Massachusetts,<sup>26</sup> Pennsylvania,<sup>27</sup> Tennessee,<sup>28</sup> Texas,<sup>29</sup> New York,<sup>30</sup> Illinois,<sup>31</sup> and Ohio.<sup>32</sup>

<sup>25</sup> *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 32 Atl. 890, 47 Am. St. Rep. 323, 33 L. R. A. 593.

<sup>26</sup> *Hudson Real Estate Co. v. Tower*, 156 Mass. 82, 30 N. E. 465, 32 Am. St. Rep. 434; *Id.*, 161 Mass. 10, 36 N. E. 680, 42 Am. St. Rep. 379; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286.

<sup>27</sup> *Strasburg R. Co. v. Echternacht*, 21 Pa. 220, 60 Am. Dec. 49; *Garrett v. Dillsburg & M. R. Co.*, 78 Pa. 465; *Auburn Bolt & Nut Works v. Schultz*, 143 Pa. 256, 22 Atl. 904; *Muncy Traction Engine Co. v. Green*, 143 Pa. 269, 13 Atl. 747.

<sup>28</sup> *Lowe v. E. & K. R. Co.*, 38 Tenn. (1 Head) 659.

<sup>29</sup> *Patty v. Hillsboro Roller Mill Co.*, 4 Tex. Civ. App. 224, 23 S. W. 336; *Lewis v. Hillsboro Roller Mill Co.* (Tex. Civ. App.) 23 S. W. 338.

<sup>30</sup> *Hamilton College v. Stewart*, 1 N. Y. 581; *Burt v. Farrar*, 24 Barb. (N. Y.) 518; *Presbyterian Church of Albany v. Cooper*, 112 N. Y. 517, 20 N. E. 352, 8 Am. St. Rep. 767, 3 L. R. A. 468; *Twenty-Third Street Baptist Church v. Cornell*, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807.

<sup>31</sup> *McClure v. Wilson*, 43 Ill. 356; *Whitsitt v. Trustees of Pre-emption Presbyterian Church*, 110 Ill. 125; *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 29 N. E. 1044, 33 Am. St. Rep. 234; *Kinsley v. International Military Encampment Co.*, 41 Ill. App. 259.

<sup>32</sup> *Painesville Nat. Bank v. King Varnish Co.*, 1 Toledo Leg. News, 304; *Ohio Wesleyan Female College v. Higgins*, 16 Ohio St. 20; *Johnson v. Otterbein University*, 41 Ohio St. 527. See this subject fully discussed in note to *Bryant's Pond Steam Mill Co. v. Felt*, 33 L. R. A. 593.

**§ 63. Right to Assign Subscriptions.**

A subscriber to corporate stock cannot at will assign his rights under the subscription agreement.<sup>33</sup> If, however, the company is willing to accept the assignee in place of the party originally liable, the subscriber may exercise the privilege of assignment by the unanimous consent of the other parties interested.<sup>34</sup>

**§ 64. Oversubscription.**

Where no provision has been made either in the prospectus, the agreement, or by-law for an apportionment of oversubscribed capital stock among the subscribers, subscriptions received after the full amount of the stock has been subscribed are void.<sup>35</sup> For this reason, when stock is offered to the public, it is quite usual to limit the date for receiving subscriptions, and to provide that upon an oversubscription the stock shall be distributed pro rata. It is sometimes provided that the commissioners may, on an oversubscription, allot the stock as they may deem the best interests of the company require.<sup>36</sup>

**§ 65. Form of Subscription Agreement.**

Whereas, it is proposed to organize under the laws of ..... a corporation to be styled (fill in proposed name), or to bear such other name as may hereafter be designated by the parties interested therein, the object of such corporation to be to transact the business of (fill in generally the nature of the business without specifying too minutely), with power to do all things which may

<sup>33</sup> *Ryder v. Alton & S. R. Co.*, 13 Ill. (3 Peck) 516; *Cartwright v. Dickinson*, 88 Tenn. (4 Pickle) 476, 12 S. W. 1030, 7 L. R. A. 706, 17 Am. St. Rep. 910.

<sup>34</sup> *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461. See *infra*, chapter XI, § 236.

<sup>35</sup> *Cox v. Hardee*, 135 Ga. 80, 68 S. E. 932.

<sup>36</sup> *Haight v. Day*, 1 Johns. Ch. (N. Y.) 18; *Clarke v. Brooklyn Bank*, 1 Edw. Ch. (N. Y.) 361; *Walker v. Devereau*, 4 Paige (N. Y.) 229.

seem calculated, directly or indirectly, to promote the business interests of said company; and

Whereas, it is proposed that said company shall have a capital stock of ..... (\$.....) dollars, to be divided into (fill in number of shares) shares of common stock, of the par value of ..... (\$.....) dollars each, and the undersigned parties each desire to become holders of stock in said corporation:

Now, therefore, we, the undersigned, in consideration of our mutual promises, do severally agree to and with each other, and with (fill in name of promoter or of trustees), who is actively interested in the formation of said corporation, to take the number of shares of stock in said corporation set opposite our respective names as signed hereto, and to pay therefor the sum of ..... (\$.....) dollars per share, such payments to be made at (fill in place of payment), on (state the time for making same, and whether they are to be in cash or in installments, and when these installments are to be called for); it being distinctly understood that upon payment in full for such shares we or our personal representatives or assigns are respectively to receive certificates of stock in said corporation to the amount of our subscriptions, and that meanwhile until payment shall be made in full said corporation shall issue to us its receipts for all payments made.

This agreement is conditioned upon the said (name of promoter or trustees) procuring other bona fide subscriptions of at least ..... (\$.....) dollars to the said capital stock.

In testimony whereof we have hereunto set our hands and affixed our seals at ....., this ..... day of ....., A. D. 19...

Name.	Residence.	Number of Shares.
John Doe, [Seal.]	New York,	100 shares.
Richard Roe, [Seal.]	Philadelphia,	" "
etc. [Seal.]	etc.	etc.

In consideration of the foregoing subscriptions and each of them I (name of promoter or of trustees) hereby agree to and with the said subscribers and each of them to use my best endeavors to obtain subscriptions for the stock of said company to the extent of at least ..... (\$.....) dollars, and to perfect the organization of said corporation as speedily as possible; and when organized to see that stock is delivered to said subscribers and each of them to the amount of their respective subscriptions.

In testimony whereof I have hereunto set my hand and affixed my seal at ....., this ..... day of ....., A. D. 19...  
A. Promoter. [Seal.]

**§ 66. Agreement for Future Subscription.**

A distinction has been made between a present subscription and an agreement to subscribe in the future. The courts have held that a contract by which the parties state that they "propose to subscribe" does not constitute a present subscription, and an action cannot be maintained upon it to hold the party signing same as a stockholder.<sup>37</sup>

<sup>37</sup> Mt. Sterling Coal Road Co. v. Little, 77 Ky. (14 Bush) 429.

## CHAPTER VI

### DOMICILE OF A CORPORATION

- § 67. Where to Organize.
- 68. Interstate Comity.
- 70. Reasons for Rule.
- 71. Restrictions Upon Foreign Corporations.
- 72. 1. Prohibition to Do Business in Home State.
- 73. 2. Conditions for Exercise of Franchise.
- 74. Citizenship of Corporations.
- 75. Corporations Engaged in Interstate Business.
- 76. Fourteenth Amendment as Applied to Corporations.
- 78. Incorporation in More Than One State.

#### § 67. Where to Organize.

The first and most natural thought in the minds of those intending to incorporate a given company is to ascertain what the laws of the particular state in which the business is to be carried on provide. Other things being equal, it is generally considered better policy to organize under the domestic laws. But a perusal of these laws will frequently disclose the fact that they are not well adapted to the most efficient administration of the business in hand. The consequence is that incorporators are often driven to avail themselves of the laws of some other jurisdiction which are more favorable for their particular project.

#### § 68. Interstate Comity.

By a principle of interstate comity a corporation organized in one state will be permitted to do business in another, where the nature of the corporate powers conferred and exercised is not contrary to the public policy of the latter state as indicated by its statutes and decisions.<sup>1</sup>

<sup>1</sup> *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 521, 10 L. Ed. 274; *Ryan v. Coster*, 14 Pet. (U. S.) 122, 10 L. Ed. 382; *Cowell v. Colo-*

§ 69. To such an extent is this true that, where persons deliberately go outside of their own states to obtain charters from other jurisdictions granting more liberal powers than their own laws afford, such corporation will be declared valid in the states where those persons live and carry on their business.<sup>2</sup> The earlier case of *Hill v. Beach*, 12 N. J. Eq. (1 Beasl.) 31, is no longer considered the law.

### § 70. Reasons for Rule.

While this doctrine would seem somewhat startling, were it not so well settled, when analyzed, the reason will appear quite plain. If a corporation composed of New York merchants decides to establish a branch house in Philadelphia, it may do so. But, should the New York laws prove more favorable to that enterprise than the Pennsylvania laws, the state of Pennsylvania, by permitting the New York corporation to do business there, would discriminate against its own citizens, if it did not permit them also to operate under a New York charter. The rule, therefore, is by no means unreasonable.

### § 71. Restrictions upon Foreign Corporations.

It is quite competent, however, for the state to permit a foreign corporation to do business within its limits only under such restrictions and limitations, not conflicting with inter-

rado Springs Co., 100 U. S. 55, 25 L. Ed. 547; *American & Foreign Christian Union v. Yount*, 101 U. S. 352, 25 L. Ed. 888; *Carroll v. City of East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Demarest v. Flack*, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854.

<sup>2</sup> *Boatmen's Bank v. Gillespie*, 209 Mo. 217, 108 S. W. 74; *Lancaster v. Amsterdam Imp. Co.*, 72 Hun, 18, 25 N. Y. Supp. 309, judgment affirmed (1894) 140 N. Y. 576, 35 N. E. 964, 24 L. R. A. 322; *Second Nat. Bank of Cincinnati v. Lovell*, 2 Cin. R. (Ohio) 397; *Oakdale Mfg. Co. v. Garst*, 18 R. I. 484, 28 Atl. 973, 23 L. R. A. 639, 49 Am. St. Rep. 784. See *infra*, § 71.

state commerce or with the federal Constitution, as it may see fit to impose, or even to forbid the privilege altogether.<sup>3</sup>

For instance, when under the laws of Texas a mercantile corporation could not be organized in that state, it was held that the rule of comity does not extend so far as to render valid the charter of such corporation obtained in another state for the sole purpose of doing business in Texas.\* The Supreme Court of California has stated the rule with regard to the admission of foreign corporations to do business in that state as follows:

"The limitations upon the power of the state to forbid a corporation from doing a domestic business within its borders or to regulate the conduct of that business may be thus summarized: A corporation unless expressly forbidden so to do may acquire rights of contract and property in a foreign jurisdiction. A state, however, may exclude absolutely a foreign corporation not engaged in interstate commerce, but which proposes solely to engage in domestic business, from doing such business within its limits, and so may, of course, impose terms and conditions upon which alone such business may be commenced within its limits, provided no unconstitutional condition is made a part of any actual agreement. When a foreign corporation has once engaged in domestic business within the state, the state may not exercise its powers of exclusion

<sup>3</sup> *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404, 15 L. Ed. 451; *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 24 L. Ed. 708; *Western Union Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 24 Sup. Ct. 74, 48 L. Ed. 188; *Floyd v. National Loan & Investment Co.*, 49 W. Va. 327, 38 S. E. 653, 87 Am. St. Rep. 805, 54 L. R. A. 536.

<sup>4</sup> *Cleaton v. Emery*, 49 Mo. App. 345; *Empire Mills v. Alston Grocery Co.*, 4 Willson, Civ. Cas. Ct. App. (Tex.) § 221, 15 S. W. 505, 12 L. R. A. 366, affirming (1891) 4 Willson, Civ. Cas. Ct. App. (Tex.) § 221, 15 S. W. 200, 12 L. R. A. 336; *Chapman v. Hallwood Cash Register Co.*, 32 Tex. Civ. App. 76, 73 S. W. 969. See *supra*, § 69.

or regulation to the destruction of the property of the corporation or of its vested constitutional rights; and, finally, when such corporation is engaged both in interstate, as well as intrastate business, no fee or regulation, though expressly directed to intrastate business will be upheld, if, in the view of the Supreme Court of the United States, such exaction or requirement imposes a burden upon the interstate business of such corporation.”<sup>5</sup>

### § 72. Prohibition to do Business in Home State.

Where a corporation is chartered in one state, and authorized to do business anywhere else except in that state, its corporate existence would not be upheld in another jurisdiction. As was said by the court in *Land Grant Ry. & Trust Co. v. Board of Com'rs of Coffey County*, 6 Kan. 245: “No rule of comity will allow one state to spawn corporations, and send them forth into other states to be nurtured and do business there, when said first-mentioned state will not allow them to do business within its own boundaries.”

### § 73. Conditions for Exercise of Franchise.

It is believed that in no state of the Union has an absolute prohibition been placed upon the conduct of business therein by foreign corporations. The general practice is to allow them to operate upon filing certified copies of their charters, paying license fees, and appointing resident agents upon whom legal process may be served. Such conditions may be validly imposed before the necessary permission is granted.<sup>6</sup>

<sup>5</sup> *H. K. Mulford Co. v. Curry* (Cal.) 125 Pac. 236.

<sup>6</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357; *Ducat v. Chicago*, 10 Wall. (U. S.) 410, 19 L. Ed. 972; *Home Ins. Co. of New York v. Morse*, 20 Wall. (U. S.) 445, 22 L. Ed. 365; *French v. Lafayette Ins. Co.*, Fed. Cas. No. 5,102, 5 McLean, 461, affirmed in (1855) 59 U. S. (18 How.) 404, 15 L. Ed. 451; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct.

§ 74. **Citizenship of Corporations.**

While, without regard to its place of doing business or the residence of its stockholders, a corporation is a citizen of the state creating it for the purpose of giving jurisdiction to a federal court of a suit by or against it, under section 2 of article 3 of the Constitution of the United States,<sup>7</sup> it is not a citizen, within the meaning of section 2 of article 4 of the Constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; and this section of the Constitution cannot be invoked in aid of the contention that a foreign corporation cannot be prevented from doing business in another state.<sup>8</sup>

§ 75. **Corporations Engaged in Interstate Business.**

The Supreme Court of the United States has laid down the rule<sup>9</sup> that the exaction by a state from a foreign corporation engaged in interstate business, of a "charter fee" of a given per cent. of its entire authorized capital stock as a condition of continuing to do local business in the state, is invalid. The

44, 36 L. Ed. 942; *Chattanooga Nat. Building & Loan Ass'n v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870.

<sup>7</sup> *City of St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423, 20 L. Ed. 192; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. (U. S.) 270, 20 L. Ed. 571; *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207; *Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794.

<sup>8</sup> *Paul v. Virginia*, 8 Wall. (U. S.) 168, 19 L. Ed. 357; *Ducat v. City of Chicago*, 10 Wall. (U. S.) 410, 19 L. Ed. 972; *Liverpool & London Life & Fire Ins. Co. v. Oliver*, 10 Wall. (U. S.) 566, 19 L. Ed. 1029; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Western Turf Ass'n v. Greenberg*, 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520; *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. —.

<sup>9</sup> *Western Union Telegraph Co. v. Kansas ex rel. Coleman*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Buck Stove & Range Co. v. Vickers*, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. Ed. —. See *infra*, chapter VII, § 119.

state of Kansas had passed a statute of this kind. The Western Union Telegraph Company declined to pay the tax imposed, and the state by its Attorney General obtained a decree in the state courts restraining the company from transacting intrastate business in Kansas. The case was appealed to the Supreme Court of the United States, and the decision was reversed by a divided court. In the majority opinion, delivered by Mr. Justice Harlan, it was held to be settled law "that a corporation of one state, authorized by its charter to engage in lawful commerce among the states, may not be prevented by another state from coming into its limits for all the legitimate purposes of such commerce," and that it may go into the state without obtaining a license from it for the purpose of its interstate business, and without liability to taxation thereof on account of such business. The court then went a step further and held "that the statutory requirement that the telegraph company shall, as a condition of its right to engage in local business in Kansas, first pay into the state school fund a given per cent. of its authorized capital, representing all its business and property everywhere, is a burden on the company's interstate commerce and its privilege to engage in that commerce, in that it makes both such commerce, as conducted by the company, and its property outside of the state, contribute to the support of the state's schools." The opinion and the briefs of counsel in the case cite the previous decisions of the court on the subject with great thoroughness.

#### § 76. Fourteenth Amendment as Applied to Corporations.

The same eminent court has recently been called upon to pass upon the status of a corporation as a "person" under the fourteenth amendment to the Constitution of the United States.<sup>10</sup> The Southern Railway Company had been doing business under a Virginia charter in the state of Alabama for

<sup>10</sup> *Southern R. Co. v. Greene*, 216 U. S. 400, 30 Sup. Ct. 287, 54 L. Ed. 536, 17 Ann. Cas. 1247; *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, 33 Sup. Ct. 69, 57 L. Ed. —.

many years, having complied with the laws of Alabama relating to foreign corporations in force at the time it entered the state, and had acquired valuable property in the state. In the year 1907 Alabama enacted a law imposing an annual franchise tax upon foreign corporations, based upon the actual amount of capital stock employed by them in the state. This tax was not imposed upon domestic corporations. The company paid the tax under protest and then sought to recover it back. In an opinion delivered by a divided court it was held that under these circumstances, the railroad's property being of a fixed and permanent nature, the company must be considered a "person" within the constitutional amendment, and thus entitled to the equal protection of the laws, and that such a tax, which was not imposed upon residents of the state doing a similar business, was illegal.

§ 77. These decisions have had the practical effect of curtailing to a very considerable extent the power of the various states to regulate foreign corporations.

#### § 78. Incorporation in More Than One State.

The status of corporations created in two or more states, under the same name and doing the same business in both, so that to all appearances they are one corporation, has been the subject of considerable discussion in our courts. As would seem natural, the majority of the companies which have been the subject of litigation in this regard have been those engaged in the business of transportation. It seems to be now pretty generally settled that when two or more corporations, each possessing the same set of stockholders, directors, and officers, the same name, and exercising the same functions, are created either by general or special laws in different states, these corporations do not thereby become legally one; but each retains its own individuality and in each state is regarded as a citizen of that particular state.<sup>11</sup> The mere fact that such a

<sup>11</sup> *Baltimore & O. R. Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Chicago & N. W. R. Co. v. Whitton*, 13 Wall. 271, 20 L. Ed. 571; *Minot*

company is organized in one state, and then authorized to do business in another, does not necessarily make it a corporation of the latter state,<sup>12</sup> although it may, by appropriate language in the act, become such.<sup>13</sup> Even when such corporations are consolidated under legislation of adjoining states, the consolidated company does not always thereby become a new corporation. The separate identity of each may be preserved;<sup>14</sup> but the consolidated corporation may act as a single unit, so far as the management of its business is concerned. It may hold its corporate meetings in either state, be managed

v. Philadelphia, W. & B. R. Co., 18 Wall. 206, 21 L. Ed. 888; Peik v. Chicago & N. W. R. Co., 94 U. S. 164, 24 L. Ed. 97; Muller v. Dows, 94 U. S. 444, 24 L. Ed. 207; Nashua & Lowell R. Corporation v. Boston & Lowell R. Corporation, 136 U. S. 356, 10 Sup. Ct. 1004, 34 L. Ed. 363; Blackburn v. Selma, M. & M. R. Co., Fed. Cas. No. 1,467, 2 Flap. 525; Missouri, K. & T. Ry. Co. v. Texas & St. L. R. Co. (C. C.) 10 Fed. 497; Washington, A. & G. Ry. Co. v. Martin, 7 D. C. 120; Quincy Railroad Bridge Co. v. Adams County, 88 Ill. 615; Allegheny County v. Cleveland & P. R. Co., 51 Pa. 228, 88 Am. Dec. 579; Rece v. Newport News & M. V. Co., 32 W. Va. 164, 9 S. E. 212, 3 L. R. A. 572.

<sup>12</sup> Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094, 30 L. Ed. 83; Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co., 174 U. S. 552, 19 Sup. Ct. 817, 43 L. Ed. 1081; Goodloe v. Tennessee Coal, Iron & R. Co. (C. C.) 117 Fed. 348; Baltimore & O. R. Co. v. Cary, 28 Ohio St. 208.

<sup>13</sup> Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 20 L. Ed. 354; Stout v. Sioux City & Pac. R. Co. (C. C.) 8 Fed. 794; Copeland v. Memphis & C. R. Co., Fed. Cas. No. 3,209, 3 Woods, 651; Quincy Railroad Bridge Co. v. Adams County, 88 Ill. 615; State ex rel. Leese v. Chicago, B. & Q. R. Co., 25 Neb. 164, 41 N. W. 125, 2 L. R. A. 564; State ex rel. Leese v. Chicago, St. P., M. & O. R. Co., 25 Neb. 165, 41 N. W. 128.

<sup>14</sup> Ashley v. Ryan, 49 Ohio St. 529, 31 N. E. 721, affirmed 153 U. S. 436, 14 Sup. Ct. 865, 38 L. Ed. 773; Antelope Co. v. Chicago, B. & Q. R. Co. (C. C.) 16 Fed. 295; Fitzgerald v. Missouri Pac. Ry. Co. (C. C.) 45 Fed. 812; Mackay v. New York, N. H. & H. R. Co., 82 Conn. 73, 72 Atl. 583, 24 L. R. A. (N. S.) 768.

by one set of officers, and no duplication of meetings is necessary in order to enable it to properly maintain its existence.<sup>15</sup>

<sup>15</sup> *Graham v. Boston, H. & E. R. R. Co.*, 118 U. S. 169, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Horne v. Boston & M. R. R. Co.* (C. C.) 18 Fed. 50; *Fitzgerald v. Missouri Pac. R. Co.* (C. C.) 45 Fed. 812; *Racine & M. R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331, 95 Am. Dec. 595; *Providence Coal Co. v. Providence & W. R. Co.*, 15 R. I. 303, 4 Atl. 394.

## CHAPTER VII

## SELECTION OF A DOMICILE.

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## § 79. Considerations Governing Domicile.

It being well settled that a corporation may be organized under the laws of any state, irrespective of its actual business habitat or the place of domicile of its incorporators,<sup>1</sup> it becomes the first duty of the corporation counsel to determine what laws will be most favorable to the efficient and economical management of any contemplated enterprise. In arriving at his conclusion he will endeavor to obtain for his clients the *maximum of benefit with the minimum of liability and expense*. This involves the consideration of many matters, the most important of which will be here enumerated, to wit:

- 1. The objects for which corporations may be organized.
- 2. The corporate powers conferred and the nature of their exercise.

<sup>1</sup> See chapter VI, § 69.

3. The amount of capital permitted; when and how paid in.
4. Personal liability of stockholders and directors.
5. Taxation; initial and annual.
6. Number, residence, and qualifications of directors.
7. Nature and extent of annual reports required.
8. What books and records must be kept in the parent state.
9. Duration of corporation.
10. Miscellaneous statutory provisions.

### § 80. States to be Considered.

In many states the corporation laws were framed many years ago, and have not been considered by lawyers and well-informed laymen as particularly adapted to the demands of modern business. In others, however, a disposition has been manifested to hold out such strong inducements to intending incorporators as to result in a very close competition for the fees and taxes accruing from conferring the corporate privilege. In those states the provisions are so much more liberal than in the more conservative commonwealths that the attention of the corporation counsel may well be confined to the following jurisdictions when selecting a domicile for his proposed company, viz.: Maine, Massachusetts, Connecticut, New York, New Jersey, Delaware, District of Columbia, Maryland, Virginia, West Virginia, South Dakota, and Nevada. The states are changing their corporation laws so rapidly that the foregoing list of eligibles is considerably longer than it was a few years ago, and will doubtless be materially changed within the next few years. No attempt, therefore, will be made to give in this treatise a summary of these laws, except in so far as it may be necessary for the purpose of indicating the manner in which the proper state is to be determined.

### § 81. The Corporation Proposed.

Let us assume that five persons desire to organize a corporation for the purpose of conducting a general mercantile

business to be carried on in the city of New York. The capital stock is to be one hundred thousand (\$100,000) dollars, divided into shares of one hundred (\$100) dollars each, of which seventy thousand (\$70,000) dollars is to be common stock, and thirty thousand (\$30,000) dollars preferred. These parties wish to avail themselves of the benefit of such laws as will expose them to as little personal liability as possible. They desire to save all the state fees they can, both at the commencement and during the progress of the corporate life. They are particularly anxious not to reveal to the public, any more than is absolutely necessary, the condition of their business from time to time.

§ 82. The foregoing may be said to be the conditions surrounding the average coterie of persons at this stage of their enterprise.

### § 83. Life of Corporations and Stockholders' Liability.

In each of the twelve political communities above enumerated such a corporation as is desired may be formed. In each its existence may be made perpetual, except in West Virginia, where the maximum life is fifty years,<sup>2</sup> and in South Dakota, where the maximum life is twenty-five years.<sup>3</sup> In all, except in Massachusetts, the liability of the stockholders is practically limited to the amount unpaid on their shares of stock or to the amount unpaid on their original subscriptions.<sup>4</sup>

<sup>2</sup> Code W. Va. 1906, c. 54, § 11 (§ 2300).

<sup>3</sup> Rev. Civ. Code S. D. 1903, § 780, as amended by Laws 1907, c. 104, § 6.

<sup>4</sup> Rev. St. Me. 1903, c. 47, § 86; Supp. to Rev. Laws Mass. 1902-1908, pp. 880, 881; Laws Conn. 1903, c. 194, § 16; Stock Corporation Law N. Y. §§ 56-59 (Wadham's Consol. Laws N. Y. pp. 4234-4236); Corporation Act N. J. 1896, § 21, as amended, 2 Comp. St. N. J. 1910, p. 1610; General Corporation Law Del. § 20; Smith on Del. Corp. § 20; Code of Law D. C. 1901, § 615; Laws Md. 1908, c. 240, § 40; Corporation Act Va. (Laws 1903, c. 5) § 9 (Code 1904, §

§ 84. **Digest of Laws.**

The following is a brief digest of the more important provisions of the laws of each of these twelve jurisdictions. Those features of the laws generally deemed undesirable from the promoter's standpoint are stated in italics; those deemed particularly advantageous, in boldfaced type.

§ 85. **Maine.**

(1) **Corporations may hold stock in other corporations.**<sup>5</sup>

(2) Stock may be issued for cash, services rendered, or property, as to the value of which (in the absence or fraud) the judgment of the directors is conclusive.<sup>6</sup>

(3) *All meetings of stockholders must be held within the state.*<sup>7</sup>

(4) No maximum limit to amount of capital; minimum, \$1,000.<sup>8</sup>

(5) No provision as to when any part of the capital must be paid in.

(6) **All incorporators and directors may be nonresident.**

(7) There must be at least three directors, **who may hold their meetings outside of the state**, and each of whom must be either a stockholder or a member of another corporation which is a stockholder.<sup>9</sup>

(8) Directors liable for declaring illegal dividends and for other acts involving breach of trust.<sup>10</sup>

(9) The records of the company, with list of stockholders, their residences and the amount of stock held by each, must be kept in the state.<sup>11</sup>

1105e); Const. W. Va. art. 11, § 2 (Code 1906, p. lxxx); Civ. Code S. D. § 441; General Corporation Law Nev. § 31; Rev. Laws Nev. § 1135.

<sup>5</sup> Rev. St. Me. 1903, c. 47, § 51.

<sup>6</sup> Id. § 50.

<sup>7</sup> Miller v. Ewer, 27 Me. 509, 46 Am. Dec. 619.

<sup>8</sup> Rev. St. Me. 1903, c. 47, § 7.

<sup>10</sup> Id. § 32.

<sup>9</sup> Id. § 19.

<sup>11</sup> Id. § 20.

(10) Annual reports must state the names and residences of directors, president, treasurer, and clerk, location of principal office in the state, and amount of authorized capital stock.<sup>12</sup>

(11) Organization, filing and recording fees, \$65.<sup>13</sup>

(12) Annual franchise tax, \$10.<sup>14</sup>

(13) *Collateral inheritance tax on stock*.<sup>15</sup>

(14) Voting trust authorized.<sup>16</sup>

### § 86. Massachusetts.

(1) *No express statutory power to hold stock in other corporations, except in gas companies*.<sup>17</sup>

(2) Stock may be issued for cash, property, or services.<sup>18</sup>

(3) *All meetings of stockholders must be held within the state*.<sup>19</sup>

(4) No maximum limit to amount of capital; minimum, \$1,000.<sup>20</sup>

(5) No provision as to when any part of the capital must be paid in, except that the directors must certify how much is to be paid before commencing business.<sup>21</sup>

(6) **All incorporators and directors may be nonresident.**

(7) There must be at least three directors,<sup>22</sup> **who may hold their meetings outside of the state**,<sup>23</sup> and each of whom (unless otherwise provided by the by-laws) shall be a stockholder.<sup>24</sup>

<sup>12</sup> Id. § 26.

<sup>13</sup> Id. § 8.

<sup>14</sup> Id. c. 8, § 18.

<sup>15</sup> Laws 1893, c. 146, § 1, as amended (Rev. St. 1903, c. 8, § 69).

<sup>16</sup> Hall v. Merrill Trust Co., 106 Me. 465, 76 Atl. 926, 138 Am. St. Rep. 355.

<sup>17</sup> See chapter 110, § 79, Rev. Laws Mass. 1902; Business Corporation Law (Laws 1903, c. 437) § 4.

<sup>18</sup> Business Corporation Law (Laws 1903, c. 437) § 14.

<sup>19</sup> Id. § 20.

<sup>22</sup> Id. § 17.

<sup>20</sup> Id. § 8.

<sup>23</sup> Id. § 25.

<sup>21</sup> Id. § 11.

<sup>24</sup> Id. § 18.

(8) Directors liable for illegally issuing stock,<sup>25</sup> declaring illegal dividends,<sup>26</sup> for false statements knowingly made by them in the articles of organization<sup>27</sup> or reports,<sup>28</sup> and for debts contracted between the time of making or assenting to a loan to a stockholder or director and the time of its repayment, to the extent of such loan.<sup>29</sup>

(9) Copy of by-laws and minutes of meetings of the stockholders, and stock and transfer books containing a complete list of names and residences of stockholders, with the amount of stock held by each, must be kept in the state.<sup>30</sup>

(10) Annual reports required, which must state corporate name, location of offices, date of last preceding meeting, total amount of authorized capital stock, the amount issued and outstanding and the amount then paid thereon, the class or classes (if any) into which it is divided, par value and number of its shares, and their market value; names and addresses of all the stockholders, and amount of stock held by each, and, if any stock is pledged, the names and residences of pledgees; names and addresses of the directors and officers, and date of expiration of term of office; also statement of the assets and liabilities of the corporation.<sup>31</sup>

(11) Organization, filing and recording fees, \$50.<sup>32</sup>

(12) Annual franchise tax upon the value of its corporate franchise, after deducting the value of its real estate and plant within the commonwealth subject to local taxation, and of securities which if owned by a natural person resident in the commonwealth would not be liable to taxation; also the value of its property situated in another state or country and subject

<sup>25</sup> Id. § 14, and section 34, as amended by Laws 1911, c. 488, § 1.

<sup>26</sup> Id. § 35.

<sup>27</sup> Id. § 11.

<sup>28</sup> Id. § 34, as amended by Laws 1911, c. 488, § 1.

<sup>29</sup> Id. § 35.

<sup>30</sup> Id. § 30.

<sup>31</sup> Id. §§ 45, 48, and section 40, as amended by Laws 1911, c. 379.

<sup>32</sup> Id., as amended by Corporation Law (Laws 1907, c. 396).

to taxation there; the rate of assessment to be determined by an apportionment of the whole amount of money to be raised by taxation upon property in the commonwealth during the same year, after deducting the amount of tax assessed upon polls for the preceding year, upon the aggregate valuation of all cities and towns for the preceding year; this rate of assessment being subject to certain limitations expressed in the business corporation law.<sup>33</sup>

(13) *An inheritance tax is imposed.*<sup>34</sup>

(14) **Voting trusts permitted.**<sup>35</sup>

### § 87. Connecticut.

(1) **Corporations may acquire stock in other corporations.**<sup>36</sup>

(2) **Stock may be paid for in cash or property, as to the value of which the judgment of the directors is final.**<sup>37</sup>

(3) *All meetings of stockholders must be held within the state.*<sup>38</sup>

(4) **No maximum limit to amount of capital; minimum, \$2,000.**<sup>39</sup>

(5) *At least \$1,000 must be paid in before commencing business.*<sup>40</sup>

(6) **All incorporators may be nonresident.**

(7) **There must be at least three directors, who should be stockholders.**<sup>41</sup> *No statutory provision is made for holding directors' meetings outside of the state.*

<sup>33</sup> Business Corporation Law 1903, § 72 and § 74, as amended by Laws 1909, c. 490, pt. III, §§ 41, 43; Laws 1910, cc. 270, 650; Laws 1912, c. 491.

<sup>34</sup> Rev. Laws Mass. 1902, c. 15; Acts 1909, cc. 266, 268, 490, pt. IV, 527.

<sup>35</sup> *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809.

<sup>36</sup> Connecticut Corporation Law (Laws 1903, c. 194) § 11.

<sup>37</sup> *Id.* § 12.

<sup>38</sup> *Id.* § 22.

<sup>39</sup> *Id.* § 63.

<sup>40</sup> *Id.* §§ 63, 69.

<sup>41</sup> *Id.* § 10.

(8) Directors liable for declaring illegal dividends<sup>42</sup> and for fraud in overvaluing the property received in payment for stock.<sup>43</sup>

(9) Original or duplicate transfer books containing names and addresses of each stockholder and the number of shares held by each must be kept in the state.<sup>44</sup>

(10) Annual reports required, showing name, residence, and post office address of each officer and director, amount of outstanding stock not paid in full and amount due thereon, and the location of the principal office in the state, with the name of the agent upon whom process may be served.<sup>45</sup>

(11) Organization, filing and recording fees, \$54.<sup>46</sup>

(12) *An inheritance tax is imposed* upon all securities in the state, and upon those outside the state except as against decedents living in a state where no such tax is imposed.<sup>47</sup>

(13) **No annual franchise tax**, except the fee for filing annual report, \$2.50.<sup>48</sup>

(14) *Voting trust illegal.*<sup>49</sup>

## § 88. New York.

(1) **Corporations may hold stock in other corporations.**<sup>50</sup>

(2) Stock may be issued for money, labor done, or property, as to the value of which (in the absence of fraud) the judgment of the directors is conclusive.<sup>51</sup>

(3) *It has been held that meetings of the stockholders outside of the state are invalid.*<sup>52</sup>

<sup>42</sup> Id. § 5.

<sup>43</sup> Id. § 12.

<sup>44</sup> Id. § 18.

<sup>45</sup> Id. § 37, as amended by Laws 1909, c. 160.

<sup>46</sup> Id. § 61; Gen. St. Conn. 1902, § 4811.

<sup>47</sup> Gen. St. Conn. 1902, § 2368; Acts 1903, c. 63; Acts 1905, c. 256; Acts 1907, c. 179; Acts 1909, c. 218.

<sup>48</sup> Connecticut Corporation Law (Laws 1903, c. 194) § 61.

<sup>49</sup> Shepaug Voting Trust Cases, 60 Conn. 553, 24 Atl. 32.

<sup>50</sup> 5 Birdseye's Cum. & Gil. Cons. Laws N. Y. p. 5767.

<sup>51</sup> Id. p. 5771.

<sup>52</sup> Ormsby v. Vermont Copper Mining Co., 56 N. Y. 623.

(4) No maximum limit to the amount of capital; minimum, \$500.<sup>53</sup>

(5) *No debt can be incurred until \$500 shall have been paid in in money or property. One-half the capital stock must be paid in within one year from date of incorporation.*<sup>54</sup>

(6) *At least one incorporator and one director must be a resident of the state of New York.*<sup>55</sup>

(7) There must be at least three directors,<sup>55</sup> **who may hold their meetings outside the state,**<sup>56</sup> and each of whom must be a stockholder unless he is named in the certificate of incorporation, provided the charter or by-laws do not dispense with this requirement.<sup>57</sup>

(8) *Directors liable for declaring illegal dividends, making false reports, breach of trust, and a number of other acts of misconduct specifically enumerated in the law.*<sup>58</sup>

(9) *Correct books of account of all business and transactions, and a stock book containing the names alphabetically arranged, of all stockholders, showing their residences and number of shares owned by each, the time when they became owners thereof, and the amount paid thereon, must be kept within the state.*<sup>59</sup>

(10) *Annual reports must show the amount of real property owned, the amount of capital stock and proportion actually issued; the amount paid in; the amount thereof employed in the state; the amount which the debts do not exceed; the minimum amount of assets; and the date and rate per centum of each dividend declared, and the names and addresses of all directors and officers.*<sup>60</sup>

<sup>53</sup> 1 Birdseye's Cum. & Gil. Cons. Laws N. Y. p. 506.

<sup>54</sup> Id. pp. 509, 511.

<sup>55</sup> 2 Birdseye's Cum. & Gil. Cons. Laws N. Y. pp. 1968, 1995; 1 Birdseye's Cum. & Gil. Cons. Laws N. Y. p. 507.

<sup>56</sup> Id. p. 507.

<sup>57</sup> 5 Birdseye's Cum. & Gil. Cons. Laws N. Y. p. 5751.

<sup>58</sup> Id. pp. 5754-5756.

<sup>59</sup> Id. p. 5758.

<sup>60</sup> Id. pp. 5763, 5850.

(11) Organization, filing and recording fee, \$62.<sup>61</sup>

(12) For the purpose of computing the annual franchise tax a distinction is made between corporations paying dividends at the rate of 6 per cent. or more and those which do not. The former are required to pay an annual tax of one-quarter of a mill for each 1 per cent. of dividend on each dollar of the same proportion of its total capital as the assets employed in the state bear to its total assets. Those paying dividends of less than 6 per cent. are required to pay a tax of one and one-half mills upon such portion of the capital stock at par as the amount of capital employed within the state bears to the entire capital. Those paying no dividends are required to pay a tax of one and one-half mills on each dollar of appraised capital stock employed in the state.<sup>62</sup>

(13) No inheritance tax on stock owned by nonresidents.<sup>63</sup>

(14) Cumulative voting permitted.<sup>64</sup>

(15) Voting trust authorized.<sup>65</sup>

(16) Stock may be issued without par value.<sup>66</sup>

## § 89. New Jersey.

(1) *Corporations cannot hold stock in other corporations.*<sup>67</sup>

(2) Stock may be issued for cash or property, or labor performed.<sup>68</sup>

<sup>61</sup> Id. p. 5944; Supplement 1911, p. 810.

<sup>62</sup> 5 Birdseye's Cum. & Gil. Cons. Laws N. Y. pp. 5948-5959.

<sup>63</sup> Laws N. Y. 1911, c. 732, § 1.

<sup>64</sup> 5 Birdseye's Cum. & Gil. Cons. Laws N. Y. p. 1990.

<sup>65</sup> Id.

<sup>66</sup> Laws N. Y. 1912, c. 351.

<sup>67</sup> Act N. J. April 21, 1896, § 51, as amended by act approved February 19, 1913.

<sup>68</sup> General Corporation Act N. J., as amended by Laws 1913, c. 14, §§ 48, 49; *Donald v. American Smelting & Refining Co.*, 62 N. J. Eq. 729, 48 Atl. 771.

(3) *All meetings of stockholders must be held within the state.*<sup>69</sup>

(4) No maximum limit to amount of capital; minimum, \$2,000.<sup>70</sup>

(5) One thousand dollars of capital stock must be subscribed before the company can do business.<sup>71</sup>

(6) **Incorporators may all be nonresident,**<sup>72</sup> *but at least one director must reside in the state.*<sup>73</sup>

(7) There must be at least three directors,<sup>73</sup> **who may hold their meetings outside of the state if the charter or by-laws so provide**<sup>74</sup> and each must be a stockholder.<sup>75</sup>

(8) Directors liable for declaring unauthorized dividends,<sup>75</sup> for making false reports, or withholding reports or signs<sup>76</sup> required by law;<sup>77</sup> for making loans to stockholders or officers; and for breach of trust.<sup>78</sup>

(9) Transfer books and stock books containing the names and addresses of the stockholders and number of shares held by each must be kept in the state.<sup>79</sup>

(10) Annual reports must show the name of the corporation, location of the registered office in the state, and name of

<sup>69</sup> New Jersey Corporation Act, § 44 (2 Comp. St. 1910, p. 1628).

<sup>70</sup> Id. § 8 (2 Comp. St. 1910, p. 1603); Smith on N. J. Corp. (1912) p. 103.

<sup>71</sup> Id.

<sup>72</sup> Central R. of New Jersey v. Pennsylvania R. Co., 31 N. J. Eq. 475; Smith on N. J. Corp. (1912) p. 49.

<sup>73</sup> General Corporation Act N. J., as amended, § 12 (2 Comp. St. 1910, p. 1606).

<sup>74</sup> Id. § 44.

<sup>75</sup> Id. § 30.

<sup>76</sup> Id. §§ 29, 45; Appleton v. American Malting Co., 65 N. J. Eq. 375, 54 Atl. 454.

<sup>77</sup> General Corporation Act N. J., as amended, § 29 (2 Comp. St. 1910, p. 1616).

<sup>78</sup> Id. §§ 55, 92 (2 Comp. St. 1910, pp. 1636, 1655).

<sup>79</sup> Id. § 33 (2 Comp. St. 1910, p. 1620).

agent upon whom process may be served, character of its business, amount of authorized capital stock, and amount actually issued and outstanding; also the names and addresses of the officers and directors and when their terms of office expire; date of the next annual meeting for election of directors, whether the name of the corporation has been at all times displayed at the entrance of its registered office, and whether such corporation has kept there the books required by law.<sup>80</sup>

(11) Organization, filing and recording fee, \$27.<sup>81</sup>

(12) Annual franchise tax, \$100.<sup>82</sup>

(13) *Collateral inheritance tax on stock*.<sup>83</sup>

(14) Cumulative voting permitted.<sup>84</sup>

(15) Voting trusts have been held valid under certain limitations.<sup>85</sup>

## § 90. Delaware.

(1) Corporations may hold stock in other corporations.<sup>86</sup>

(2) Stock may be issued for cash, services rendered, or property, as to the value of which in the absence of fraud, the judgment of the directors is conclusive.<sup>87</sup>

<sup>80</sup> Id. § 43 (2 Comp. St. 1910, p. 1625).

<sup>81</sup> Id. § 114 (2 Comp. St. 1910, p. 1665).

<sup>82</sup> Smith on N. J. Corp. (1912 Ed.) § 163, p. 185.

<sup>83</sup> Dixon v. Russell, 78 N. J. Law, 296, 73 Atl. 51; P. L. 1909, pp. 304, 325, et seq.

<sup>84</sup> P. L. N. J. 1900, p. 418; Loewenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 440, 28 Atl. 454.

<sup>85</sup> Chapman v. Bates, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; Warren v. Pim, 66 N. J. Eq. 353, 59 Atl. 773; Smith on N. J. Corp. (1912 Ed.) p. 70. See *infra*, chapter XXIII, §§ 494-500. But it may be held that the policy of the state as indicated in chapter 13, Laws N. J. 1913, approved February 19, 1913, is opposed to the creation of voting trusts, and that such agreements would not now be upheld.

<sup>86</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 135.

<sup>87</sup> Id. § 14, as amended by Laws 1905, c. 155.

(3) **Stockholders' meetings may be held outside the state of Delaware if so provided in the by-laws.**<sup>88</sup>

(4) No maximum limit to amount of capital; minimum limit, \$2,000.<sup>89</sup>

(5) One thousand dollars of the capital stock must be subscribed before the company can do business.<sup>90</sup>

(6) **All incorporators may be nonresident, but at least one director must reside in the state.**<sup>91</sup>

(7) There must be at least three directors,<sup>91</sup> **who may hold their meetings outside of the state if the by-laws so provide,**<sup>92</sup> and each must be a stockholder.<sup>91</sup>

(8) Directors liable for making unauthorized dividends,<sup>93</sup> for knowingly making false reports or withholding reports required by law, and for breach of trust.<sup>94</sup>

(9) Original or duplicate stock ledger containing the names and addresses of the stockholders, and the number of shares held by each, must be kept in the state.<sup>95</sup>

(10) Annual reports must state the location of the principal office in the state, name of agent upon whom process may be served, names and addresses of directors and officers, when the term of each expires, amount of the authorized capital and what part of it is actually paid in, what part is invested in real estate and the annual tax thereon, and the amount invested in manufacturing or mining within the state, or both, date appointed for next annual meeting, and location of places of business outside of state.<sup>96</sup>

(11) Organization, filing and recording fees, \$15.<sup>97</sup>

<sup>88</sup> Id. § 32.

<sup>91</sup> Id. § 9.

<sup>89</sup> Id. § 5.

<sup>92</sup> Id. §§ 30, 32.

<sup>90</sup> Id.; Dill, N. J. Corp. p. 22.

<sup>93</sup> Id. § 35.

<sup>94</sup> Id. § 37; Delaware Franchise Tax Act 1899, §§ 2 and 3, as amended.

<sup>95</sup> Id. § 29.

<sup>96</sup> Delaware Franchise Tax Act 1899, § 2, as amended.

<sup>97</sup> Id. § 129.

- (12) Annual franchise tax, \$10.<sup>98</sup>
- (13) No inheritance tax on stock owned by nonresidents.<sup>99</sup>
- (14) Bondholders may be given the right to vote.<sup>100</sup>

§ 91. Maryland.

- (1) Corporations may hold stock in other corporations.<sup>101</sup>
- (2) Stock may be issued for cash, services rendered, or property, as to the value of which, in the absence of fraud, the judgment of the stockholders is conclusive.<sup>102</sup>
- (3) *Stockholders' meetings must be held inside the state.*<sup>103</sup>
- (4) No limit as to amount of capital. Capital must be paid in at least one-fourth each year.<sup>104</sup>
- (5) No requirement as to amount to be subscribed as condition of doing business.
- (6) *One incorporator and one director must reside in the state.*<sup>105</sup>
- (7) There must be at least three directors, **who may hold their meetings outside the state.**<sup>106</sup> The statute does not require directors to be stockholders.
- (8) Directors liable for declaring unauthorized dividends, loaning to officers or directors, or making false reports.<sup>107</sup>

<sup>98</sup> Delaware Franchise Tax Act 1899, § 4, as amended.

<sup>99</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 16.

<sup>100</sup> Id. § 29.

<sup>101</sup> Laws Md. 1908, c. 240, § 7.

<sup>102</sup> Id. § 35; *Miller v. Cosmic Cement, Tile & Stone Co.*, 109 Md. 11, 71 Atl. 91; *Sturtevant Mill Co. v. Cosmic Cement & Stone Co.*, 111 Md. 667, 76 Atl. 412.

<sup>103</sup> Laws Md. 1908, c. 240, § 17.

<sup>104</sup> Laws Md. 1908, c. 305, p. 58.

<sup>105</sup> Laws Md. 1908, c. 240, §§ 3, 8.

<sup>106</sup> Id. § 12.

<sup>107</sup> Code Md. 1904, art. 27, § 134; *Carroll v. Manganese Steel Safe Co.*, 111 Md. 252, 73 Atl. 665; *McGaw v. Acker, Merrill &*

- (9) No provision requiring books to be kept in the state.
- (10) No annual reports required from corporations not doing business in the state.<sup>108</sup>
- (11) Organization, filing and recording fees, \$128.<sup>109</sup>
- (12) No annual franchise tax.
- (13) No inheritance tax on stock owned by nonresidents.<sup>110</sup>
- (14) Cumulative voting permitted.<sup>111</sup>
- (15) Voting trusts permitted.<sup>112</sup>

§ 92. District of Columbia.

- (1) *Corporations cannot use any of their funds in the purchase of stock of other corporations.*<sup>113</sup>
- (2) Stock may be issued either for money or property at its actual value.<sup>114</sup> *No statutory authority is given to issue stock for services performed.*
- (3) The statute is silent as to where the meetings of the stockholders may be held.
- (4) No maximum limit to the amount of capital.
- (5) *All the capital stock must be subscribed and ten per cent. paid in before incorporation.*<sup>115</sup>
- (6) *The majority of the trustees shall be citizens of the District.*<sup>116</sup>

Condit Co., 111 Md. 153, 73 Atl. 731, 134 Am. St. Rep. 592; Buchwald Transfer Co. v. Hurst, 111 Md. 572, 75 Atl. 111, 19 Ann. Cas. 619; Sumwalt Ice & Coal Co. v. Knickerbocker Ice Co., 112 Md. 437, 77 Atl. 56; Foutz v. Miller, 112 Md. 458, 76 Atl. 1111.

<sup>108</sup> Code Md. 1904, art. 81, § 150.

<sup>109</sup> Code Md. 1904, art. 81, § 101b, as added by Laws 1910, c. 488.

<sup>110</sup> Code Md. 1904, art. 81, § 117, as amended by Laws 1908, c. 695.

<sup>111</sup> Laws Md. 1908, c. 240, § 20.

<sup>112</sup> Id. § 77.

<sup>113</sup> Code of Law D. C. 1901, § 620.

<sup>114</sup> Id. § 613.

<sup>115</sup> Act Feb. 4, 1905, c. 299, 33 U. S. Stat. 689.

<sup>116</sup> Code of Law D. C. 1901, § 608.

(7) There must be at least three trustees, each of whom must be a stockholder.<sup>116</sup> No provision is made as to the place where trustees may hold their meetings.

(8) Trustees liable for knowingly making false reports,<sup>117</sup> for making loans to stockholders upon the security of the corporate stock,<sup>118</sup> and for declaring illegal dividends.<sup>119</sup>

(9) List of all persons who are or have been within six years stockholders of the company, with their places of residence, number of shares held by them respectively, the time when they became the owners thereof, and amount of stock actually paid in, must be kept in the District.<sup>120</sup>

(10) Annual reports must be filed and published, stating amount of capital and the proportion actually paid in, and the amount of existing debts.<sup>121</sup> Schedule must be filed annually stating tangible personal property.<sup>122</sup>

(11) Organization, filing and recording fees, \$42.<sup>123</sup>

(12) No annual franchise tax.<sup>124</sup>

(13) No inheritance tax on stock.

## § 93. Virginia.

(1) Corporations may hold stock in other corporations if so stated in the charter.<sup>125</sup>

(2) Stock may be issued for cash, services rendered, or property, as to the value of which (in the absence of fraud) the judgment of the directors is conclusive.<sup>126</sup>

<sup>116</sup> Code of Law D. C. 1901, § 608.

<sup>119</sup> Id. § 622.

<sup>117</sup> Id. § 619.

<sup>120</sup> Id. §§ 627, 628.

<sup>118</sup> Id. § 621.

<sup>121</sup> Id. § 617.

<sup>122</sup> Act July 1, 1902, c. 1352, § 6, 32 U. S. Stat. 617.

<sup>123</sup> Act Feb. 4, 1905, c. 299, 33 U. S. Stat. 689.

<sup>124</sup> Act April 28, 1904, c. 1815, 33 U. S. Stat. 564.

<sup>125</sup> General Incorporation Act Va. (Laws 1903, c. 270, subc. 5) §§ 2h, 5 (1 Code Va. 1904, p. 557, § 1105e, subds. 2h, 5).

<sup>126</sup> Id. § 9 (1 Code Va. 1904, p. 559, § 1105e, subd. 9).

(3) *Annual meetings of the stockholders must be held within the state.*<sup>127</sup>

(4) No maximum or minimum limit to the amount of capital.

(5) No provision as to when any part of the capital must be paid in.

(6) **All incorporators and directors may be nonresident.**<sup>128</sup>

(7) There must be at least three directors<sup>129</sup> **who may hold their meetings outside of the state.**<sup>130</sup>

(8) Directors liable for willfully making false reports<sup>131</sup> and for declaring illegal dividends.<sup>132</sup>

(9) **No books need be kept in the state.**

(10) Annual reports must state the name of the corporation, location of principal office in the state and name of the agent upon whom process may be served, character of its business, amount of authorized capital stock, what part of it is actually issued and outstanding, names and addresses of the officers and directors and when their terms of office expire, and the date appointed for the next annual meeting of the stockholders.<sup>133</sup>

(11) Organization, filing and recording fees, \$32.<sup>134</sup>

(12) Annual franchise and registration fee, \$55.<sup>135</sup>

<sup>127</sup> Id. § 7 (1 Code Va. 1904, p. 559, § 1105e, subd. 7); Laws 1906, c. 17, p. 13; Laws 1910, c. 35, p. 43.

<sup>128</sup> Id. c. 1, § 14 (1 Code Va. 1904, p. 532, § 1105a, subd. 14).

<sup>129</sup> Id. § 13 (1 Code Va. 1904, p. 532, § 1105a, subd. 13); Id., c. 5, § 10 (1 Code Va. 1904, p. 560, § 1105e, subd. 10).

<sup>130</sup> Id. c. 5, § 5 (1 Code Va. 1904, p. 558, § 1105e, subd. 5).

<sup>131</sup> Id. § 26 (1 Code Va. 1904, p. 564, § 1105e, subd. 26).

<sup>132</sup> Id. § 60 (1 Code Va. 1904, p. 578, § 1105e, subd. 60).

<sup>133</sup> Id. § 39 (1 Code Va. 1904, p. 570, § 1105e, subd. 39); Laws 1906, c. 17, p. 13.

<sup>134</sup> Tax Law 1903, §§ 38, 56 (2 Code Va. 1904, pp. 2215, 2226); Laws 1910, c. 53, p. 77.

<sup>135</sup> Id. §§ 41, 43 (2 Code Va. 1904, pp. 2217, 2218), as amended by Laws 1908, cc. 227, 334.

(13) No inheritance tax on stock owned by nonresidents.<sup>136</sup>

(14) Cumulative voting permitted.<sup>137</sup>

(15) Bondholders may be given the right to vote.<sup>138</sup>

(16) Voting trusts permitted.<sup>139</sup>

#### § 94. West Virginia.

(1) Corporations may hold stock in other corporations.<sup>140</sup>

(2) Stock may be issued for cash, services rendered, or property, as to the value of which (in the absence of fraud) the judgment of the directors or stockholders is conclusive.<sup>141</sup>

(3) Stockholders' meetings may be held outside of the state.<sup>142</sup>

(4) No maximum or minimum limit to the amount of capital.

(5) Ten per cent. of the amount subscribed by each incorporator must be paid in before signing the articles of incorporation.<sup>143</sup>

(6) All incorporators and directors may be nonresident.<sup>144</sup>

<sup>136</sup>Acts 1910, c. 148, amending Acts 1903, c. 148, § 44.

<sup>137</sup>General Incorporation Act Va. (Laws 1903, c. 270, subc. 5) § 19 (1 Code Va. 1904, p. 563, § 1105e, subd. 19).

<sup>138</sup>Id. § 29 (1 Code Va. 1904, p. 565, § 1105e, subd. 29).

<sup>139</sup>Carnegie Trust Co. v. Security Life Ins. Co. of America, 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287.

<sup>140</sup>Code W. Va. 1899, c. 52, § 3, as amended (Acts 1901, p. 94, c. 35, § 1).

<sup>141</sup>Spring Garden Bank v. Hurlings Lumber Co., 32 W. Va. 357, 9 S. E. 243, 3 L. R. A. 583; Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92; Code W. Va. 1906, c. 53, § 2253.

<sup>142</sup>Code W. Va. 1899, c. 54, § 23, as amended by Acts 1901, p. 108, c. 35.

<sup>143</sup>Id. § 7; chapter 53, § 25.

<sup>144</sup>Id. c. 53, § 49.

(7) There must be at least five directors (unless otherwise provided in the by-laws),<sup>144</sup> **who may hold their meetings outside of the state,**<sup>145</sup> and none of whom need be stockholders.<sup>144</sup>

(8) Directors liable for declaring illegal dividends<sup>146</sup> and for breach of trust.

(9) **No books need be kept in the state.**

(10) Annual reports must be made showing the name of the corporation, date of its charter, name and post office address of the president, secretary, and treasurer, the amount of its authorized capital stock, number of acres of land held in the state (if the number exceeds 10,000), and such other facts as the auditor may require.<sup>147</sup>

(11) Organization, filing and recording fees, \$77.<sup>148</sup>

(12) Annual franchise tax, \$60.<sup>148</sup>

(13) *An inheritance tax is imposed.*<sup>149</sup>

(14) **Cumulative voting permitted.**<sup>150</sup>

(15) **Action of directors may be valid without calling a regular meeting of the board.**<sup>151</sup>

## § 95. South Dakota.

(1) *Corporations have no statutory power to hold stock in other corporations.*

<sup>144</sup> Id. c. 53, § 49.

<sup>145</sup> Id. c. 54, § 23, as amended by Acts 1901, p. 108, c. 35.

<sup>146</sup> Id. c. 53, § 40.

<sup>147</sup> Id. c. 53, § 46, as amended (Acts 1901, p. 98, c. 35); Id. c. 32, § 88, as amended (Acts 1901, p. 114, c. 35, § 36).

<sup>148</sup> Id. c. 32, §§ 124, 129, 131, as amended (Acts 1905, c. 36, §§ 128, 129, 131; Acts Sp. Sess. 1907, c. 16; Acts Sp. Sess. 1907, c. 9, § 2, as amended by Laws 1911, c. 57).

<sup>149</sup> W. Va. Act approved Feb. 22, 1913.

<sup>150</sup> Code W. Va. 1899, c. 53, § 44.

<sup>151</sup> Id. c. 53, § 51, as amended (Acts 1901, p. 100, c. 35, § 16).

(2) Stock may be issued for cash, services rendered, or property,<sup>152</sup> as to the value of which, in the absence of fraud, the judgment of the directors is conclusive.<sup>153</sup>

(3) Stockholders' meetings may be held outside of the state.<sup>154</sup>

(4) No maximum or minimum limit to the amount of capital.

(5) No provision as to when any part of the capital must be paid in.

(6) *At least one of the incorporators and one of the directors or officers must reside in the state.*<sup>155</sup>

(7) There must be at least three directors,<sup>156</sup> who may hold their meetings outside of the state,<sup>157</sup> and all of whom must be stockholders.<sup>158</sup>

(8) Directors liable for illegally reducing the capital stock, for declaring illegal dividends, and for creating debts beyond the subscribed capital stock,<sup>159</sup> and for otherwise willfully causing the corporation to become insolvent in violation of the statute;<sup>159</sup> also for failing to file the annual report,<sup>160</sup> or for willful false statements in any report;<sup>161</sup> also for fraudulent appropriation of property.<sup>162</sup>

(9) *Copy of the by-laws, record of all business transactions, journal of all meetings of directors and stockholders, embracing every act done or ordered to be done, and stating who were present and absent as well as other details, must be kept in the "office of the corporation"; also a stock and transfer book showing the names of all stockholders, installments paid or unpaid, assessments levied and paid or unpaid; particulars as to every stock transfer, etc.*<sup>163</sup>

<sup>152</sup> Const. S. D. art. 17, § 8.

<sup>158</sup> Id. § 436.

<sup>153</sup> Civ. Code S. D. § 423.

<sup>159</sup> Id. § 787.

<sup>154</sup> Id. § 786.

<sup>160</sup> Id. § 784.

<sup>155</sup> Id. §§ 404, 410.

<sup>161</sup> Id. § 437.

<sup>156</sup> Id. § 434.

<sup>162</sup> Id. §§ 436, 449, 781.

<sup>157</sup> Id. § 786.

<sup>163</sup> Id. §§ 430, 445, 782.

(10) Annual reports must be published, stating the capital stock and amount actually paid in, and amount and nature of indebtedness due to and by the corporation, number and amount of dividends and when paid, and net amount of profits.<sup>164</sup>

(11) Filing and recording fees, \$15.<sup>165</sup>

(12) **No annual franchise tax.**

(13) **No inheritance taxes on stock owned by nonresidents.**<sup>166</sup>

(14) **Cumulative voting permitted.**<sup>167</sup>

### § 96. Nevada.

(1) **Corporations may hold stock in other corporations.**<sup>168</sup>

(2) Stock may be issued for cash, services rendered or property, as to the value of which (in the absence of fraud) the judgment of the directors is conclusive.<sup>169</sup>

(3) **Stockholders' meetings may be held outside of the state.**<sup>170</sup>

(4) No maximum limit to the amount of capital; minimum, \$2,000.<sup>171</sup>

(5) *\$1,000 of the capital stock must be subscribed before the company can commence business.*<sup>171</sup>

(6) **All incorporators and directors may be nonresident.**<sup>172</sup>

(7) **There must be at least three directors, who may hold their meetings outside of the state.**<sup>173</sup>

<sup>164</sup> Id. § 784.

<sup>165</sup> Laws S. D. 1903, c. 141; Laws 1907, c. 149.

<sup>166</sup> Laws S. D. 1905, c. 54, Comp. Laws 1910, vol. 1, pp. 549-553; In re McKennan's Estate, 25 S. D. 369, 126 N. W. 611, 33 L. R. A. (N. S.) 606.

<sup>167</sup> Const. S. D. art. 17, § 5.

<sup>168</sup> Nevada General Incorporation Law 1903, §§ 101, 110; St. 1905, p. 77, c. 51, § 11.

<sup>169</sup> Id. §§ 28, 54.

<sup>170</sup> Id. §§ 12, 14.

<sup>171</sup> Id. § 4, as amended 1905 (St. 1905, p. 77, c. 51).

<sup>172</sup> Id. § 1.

<sup>173</sup> Id. §§ 4, 14, 23.

(8) Directors liable for declaring illegal dividends or illegally reducing capital stock,<sup>174</sup> for publishing false statements,<sup>175</sup> and for breach of trust.<sup>176</sup>

(9) *Stock ledger containing the names and addresses of all stockholders, with the number of shares of stock owned by each, must be kept in the state.*<sup>177</sup>

(10) *Annual reports required, stating names of all directors and officers, with date of election or appointment of each, term of office, residence and post office address of each, and character of his business, with location of principal office in the state and name of agent in charge thereof.*<sup>178</sup>

(11) Organization, filing and recording fees, \$10.00.<sup>179</sup>

(12) No annual franchise tax, except retaliatory taxation.<sup>180</sup>

(13) No inheritance taxes.<sup>181</sup>

(14) Cumulative voting permitted.<sup>182</sup>

(15) Bondholders may be given the right to vote.<sup>183</sup>

(16) Action of stockholders or directors may be valid without calling a regular meeting.<sup>184</sup>

## § 97. Analysis of the Foregoing Laws.

We must assume that the shares of stock which will be issued by our proposed corporation will ultimately find their way into the hands of many people, the majority of whom will probably reside in the vicinity of the city of New York. That being the place where the business of the company is to be carried on, it will be convenient to have the corporate meetings held as near the main office of the company as practicable. It

<sup>174</sup> Id. §§ 42, 68.

<sup>176</sup> Id. § 77.

<sup>175</sup> Id. §§ 73-76.

<sup>177</sup> Id. §§ 58, 71.

<sup>178</sup> Id. § 85, as amended by Laws 1905, c. 51, p. 75, § 8.

<sup>179</sup> 1 Rev. Laws Nev. 1912, § 1203.

<sup>180</sup> Nevada General Incorporation Law 1903, § 106.

<sup>181</sup> Id. § 57.

<sup>182</sup> Id. § 11.

<sup>183</sup> Id. § 20.

<sup>184</sup> Id. §§ 23, 111.

would be extremely troublesome to the stockholders to be obliged to travel to a distant state every time a stockholders' meeting is to be held. If, therefore, it should appear that certain places whose corporation laws are otherwise adapted to our purpose require all corporate meetings to be held within their borders, such states may be thrown out of our consideration, provided other jurisdictions nearer home hold out inducements nearly as great.

§ 98. A glance at the foregoing table will satisfy us that it would be inconvenient to take advantage of the beneficial laws of *Maine, Massachusetts, Virginia, or Maryland* on this very ground. The meetings of stockholders of corporations chartered by any of those jurisdictions must be held within the state or territory granting the charter.<sup>185</sup> While those residing near to or within the borders of any of these commonwealths might well incorporate in one of them, we find them unsuited for our purposes, with no counterbalancing advantages which cannot be found elsewhere.

§ 99. The inconvenience of holding stockholders' meetings at some distance from the place of business and from the residence of shareholders might be obviated by delivering proxies to persons either residing within the state or who can be persuaded to travel there for the purpose of such meetings.<sup>186</sup> But as a rule stockholders like to be able to attend such meetings in person, and learn for themselves how the business of the company is being conducted, even though on ordinary occasions they may not avail themselves of the privilege.

<sup>185</sup> *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Business Corporation Law Mass.* 1903, c. 437, § 20; *General Incorporation Act Va.* (Laws 1903, c. 270, subc. 5) § 7 (1 Code Va. 1904, p. 559, § 1105e, subd. 7); *Laws Va.* 1906, p. 13, c. 17; *Laws Va.* 1910, p. 43, c. 35; *Laws Md.* 1908, c. 240, § 17.

<sup>186</sup> *Crook v. International Trust Co. of Maryland*, 32 App. D. C. 490; *People ex rel. Chritzman v. Crossley*, 69 Ill. 195; *Commonwealth v. Detwiller*, 131 Pa. 614, 18 Atl. 990, 7 L. R. A. 357, 360; *State ex rel. Kilbourn v. Tudor*, 5 Day (Conn.) 329, 5 Am. Dec. 162.

§ 100. In *Maine*<sup>187</sup> and *Massachusetts*<sup>188</sup> an inheritance tax is imposed upon stock whether owned by residents or non-residents—a burden which it is well to avoid if possible. In *Maryland* the organization expenses are so much higher than in the other states named that this feature alone might cause considerable hesitation.<sup>189</sup>

§ 101. The detailed nature of the annual report required in *Massachusetts*<sup>190</sup> necessitates greater publicity than that to which our supposed incorporators desire to be subjected, and in that state no express authority is given for holding stock in other corporations.

§ 102. In *Connecticut* we have the same restriction upon the place of holding stockholders' meetings, to wit, that they must be held within the state; but as Connecticut is so easily accessible to New York, this will not prove very much of a hindrance. There is, however, an omission in the statute which might cause trouble. No statutory provision is found enabling the directors to hold their meetings outside of the state. The directors should be able to meet at short notice at a place readily available to all concerned. If they must travel outside of the state to accomplish this, the machinery for conducting the corporate business will be found somewhat cumbersome. More will be said in another place upon the law relating to the place of holding such meetings.<sup>191</sup>

§ 103. Should the stockholders desire to organize a voting trust they will in this state be met with a decision squarely holding such combinations illegal.<sup>192</sup> A consideration which

<sup>187</sup> Laws Me. 1893, c. 146, as amended (Rev. St. 1903, c. 8, § 69).

<sup>188</sup> Rev. Laws Mass. 1902, c. 15; Acts 1909, c. 266, 268, 490, pt. IV, 527.

<sup>189</sup> Code Md. 1904, art. 81, § 101b, as added by Laws 1910, c. 488.

<sup>190</sup> Business Corporation Law Mass. 1903, c. 437, § 40, as amended by Laws 1911, c. 379, and sections 45, 48.

<sup>191</sup> *Infra*, chapter II, §§ 214–220.

<sup>192</sup> *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32.

would influence many in determining to select either Connecticut or Maryland as the domicile of a corporation is the fact that, because those states require no annual franchise tax, this yearly expenditure, which must be made under the laws of most other places, would be saved.

§ 104. *South Dakota* does not seem attractive from our standpoint. One of the incorporators and one of the directors or officers must reside in that state.<sup>193</sup> For a corporation whose habitat is in New York this would not be particularly conducive to the proper transaction of business. Many corporations overcome this difficulty by resorting to dummy incorporators and directors who reside in that state. But this is hardly a dignified procedure nor one that commends itself to the average business man.

§ 105. On examining further into the laws of that state, two features which exist would cause us to hesitate a long while before resorting to the protection of its franchise. These are, first, the failure to permit the holding of stock in other corporations; and, second, the fact that every corporate act must appear on record, open to the inspection of every creditor.<sup>194</sup>

§ 106. As offsetting these disadvantages, this state provides the same economical exemption from any annual franchise tax as do Connecticut and Maryland.

§ 107. The law of the District of Columbia is crude in many respects. Instead of being framed after the approved models which have been found by experience to work so well elsewhere, it is an astonishing fact that many of the provisions the wisdom of inserting which in other codes of laws has been demonstrated by experience, are entirely omitted in this compilation, and much is left to conjecture. The courts have not yet construed most of the provisions of this law, and persons availing themselves of it will be left in great doubt upon many points.

<sup>193</sup> Civ. Code S. D., §§ 404, 410.

<sup>194</sup> Id. §§ 430, 445, 782.

§ 108. A corporation in that District can be created for one object only,<sup>195</sup> a matter of great practical inconvenience, causing difficulty in drafting for any considerable business undertaking a charter which will be received for record. The fact that the residences of the majority of the "trustees" (not "directors," as they are generally called) are restricted to the District of Columbia will prevent our proposed corporation from utilizing these laws.<sup>196</sup> The provision that all the capital stock shall be subscribed and that not less than ten per cent. of its par value shall be actually paid in cash and the money derived therefrom in the possession of the persons named as the first board of trustees, before incorporation, may also prove a stumbling-block.<sup>197</sup> It may not be desirable, either, to file an annual report stating the amount of existing debts, as the District of Columbia Code specifies must be done.<sup>198</sup> In this connection, however, it should be stated that the only penalty provided for not making this report is that any interested person may by mandamus proceedings require the publication of the report, in which case the corporation officers at fault may be compelled to pay all the expenses of the proceeding, including counsel fees.<sup>199</sup>

§ 109. No corporation organized under the District of Columbia laws can use any of its funds in the purchase of stock in another corporation.<sup>200</sup>

§ 110. It is also well to bear in mind that a District of Columbia corporation (which under the law is a citizen of the District of Columbia) is not permitted to sue in the federal courts, because, not being a citizen of any *state*, it is not em-

<sup>195</sup> Code of Law D. C. 1901, § 606; *Dancy v. Clark*, 24 App. D. C. 487.

<sup>196</sup> Code of Law D. C. 1901, § 608.

<sup>197</sup> Act Feb. 4, 1905, c. 299, 33 U. S. Stat. 689.

<sup>198</sup> Code of Law D. C. 1901, § 617.

<sup>199</sup> Id. § 618.

<sup>200</sup> Id. § 620.

braced within the privilege conferred by the Constitution of the United States in this regard.<sup>201</sup>

§ 111. Other sections of the law might be cited which would have a deterrent effect, but these are sufficient to indicate that the District of Columbia is not a favorable domicile, at least for *nonresident* corporations, however wise it might be for *resident* corporations to organize there.

There is nevertheless great economy in incorporating under these laws, inasmuch as there is no fee charged for the annual franchise.

§ 112. An examination of the incorporation law of the state of *Nevada* discloses none of the undesirable features indicated in considering the laws of the states before mentioned. In fact it seems to have been the effort of the framers of this law to weave into it the particularly attractive provisions enacted by the Legislatures of the states of Delaware and West Virginia, which we shall presently consider. There is no annual franchise tax. Those residing in Western states would do well to seriously consider the statute of this state before deciding to incorporate elsewhere. But to Eastern capitalists several objections present themselves: First. It is far away from them and their business, and in the present state of corporate development suspicion is apt to be aroused in the minds of the public if resort is had to a state so distant, if similar advantages can be found nearer home. Second. It is unwise, if not unlawful, to hold the initial meeting outside of the state which confers the charter privileges. This would practically require our intended incorporators either to travel nearly to the Pacific Coast to organize, or else to send their proxies to some one in that state, and effect their organization through straw men—a device which is frequently resorted to, but one the wisdom of which is doubtful.

<sup>201</sup> *Hepburn v. Ellzey*, 2 Cranch (U. S.) 445, 2 L. Ed. 332; *Barney v. Baltimore*, 6 Wall. (U. S.) 280, 18 L. Ed. 825; *Adams Express Co. v. Denver & R. G. R. Co.* (C. C.) 16 Fed. 712; *Matter of Cushing's Estate*, 40 Misc. Rep. 505, 82 N. Y. Supp. 795.

§ 113. This leaves for our consideration only four states, viz., *New York, New Jersey, Delaware, and West Virginia*. Taking first the three states which are foreign to the proposed place of business of our assumed incorporators, a brief comparison of their laws is in order. Of these states West Virginia was the pioneer in liberal incorporation laws. The revenues derived from the creation of corporations there became so great that New Jersey so changed its statute as to permit of very much greater liberality than previously was allowed. Delaware then passed a law copied very closely from that of New Jersey, but adding certain provisions not included in the legislation of the latter state.

§ 114. Some of the differences between the laws of these two last-named states are as follows: In both Delaware<sup>202</sup> and New Jersey,<sup>203</sup> stock may be issued for services rendered. Delaware has an advantage over New Jersey, in that by the laws of the former state stockholders' meetings may be held beyond the limits of the state,<sup>204</sup> whereas in New Jersey they must be held in the state.<sup>205</sup> In view of the fact that but little time would be consumed in crossing the ferry between New York City (where our intended place of business is to be) and Jersey City, this will not prove an embarrassment in this particular case. Both states have an inheritance tax, but in Delaware it does not apply to nonresidents,<sup>206</sup> whereas in New Jersey it does.<sup>207</sup> In Delaware bondholders may be given the right to vote.<sup>208</sup> No such power is given by the New Jersey laws; but the laws of the latter state do permit cumulative

<sup>202</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 14.

<sup>203</sup> General Corporation Act N. J. §§ 48, 49, as amended by chapter 14, Laws 1913.

<sup>204</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 32.

<sup>205</sup> 2 Comp. St. N. J. 1910, § 44, p. 1628.

<sup>206</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 16.

<sup>207</sup> P. L. N. J. 1909, pp. 304, 325, et seq.

<sup>208</sup> General Corporation Laws Del. (Laws 1901-03, c. 394) § 29.

voting,<sup>209</sup> a feature upon which the statutes of Delaware are silent. In New Jersey voting trusts have been upheld under certain limitations, but it may now be considered doubtful whether the courts would not be more strongly disposed to regard them as illegal, in view of the provisions of the New Jersey anti-trust law of 1913.<sup>210</sup> The initial and annual franchise expenses in Delaware<sup>211</sup> are lower than in New Jersey.<sup>212</sup>

§ 115. The laws of Delaware seem better suited for our purposes than do those of New Jersey.

§ 116. Contrasting the laws of Delaware with those of West Virginia, we find many of their provisions quite similar. Delaware has the advantage in lower initial and annual fees;<sup>213</sup> and in Delaware bondholders may be given the right to vote.<sup>214</sup> But in West Virginia there is no minimum limit to the capitalization as there is in Delaware,<sup>215</sup> thus permitting the organization of a smaller corporation. While this would not affect the particular corporation we have in mind, it is worthy of note at this point. In West Virginia only ten per cent. of the amount of stock *subscribed* must be paid in be-

<sup>209</sup> P. L. N. J. 1900, p. 418; *Loewenthal v. Rubber Reclaiming Co.*, 52 N. J. Eq. 440, 28 Atl. 454.

<sup>210</sup> *Chapman v. Bates*, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773; *Smith on N. J. Corp.* (1912 Ed.) p. 70. See *infra*, §§ 494-500; *Laws N. J.* 1913, c. 13, approved February 19, 1913.

<sup>211</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 129; Delaware Franchise Tax Act 1899, § 4, as amended.

<sup>212</sup> 2 Comp. St. N. J. 1910, § 114, p. 1665.

<sup>213</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 129; Delaware Franchise Tax Act 1899, § 4, as amended; Code W. Va. c. 32, §§ 124, 129, 131, as amended (Acts 1905, c. 36, §§ 128, 129, 131; Acts Sp. Sess. 1907, c. 16; Acts Sp. Sess. 1907, c. 9, § 2, as amended by Acts 1911, c. 57).

<sup>214</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 29.

<sup>215</sup> *Id.* § 5. See *infra*, § 117.

fore commencing business,<sup>216</sup> and as there is no minimum limit to the amount subscribed, this provision allows the business to be commenced on a most moderate basis. In West Virginia none of the incorporators or directors need to reside in the state,<sup>217</sup> while under the laws of Delaware one of the directors must reside in that state.<sup>218</sup> Whether or not the West Virginia provision that none of the directors need be stockholders<sup>219</sup> is wise may be open to question, but this matter may be easily regulated by the by-laws. The fact that no corporate books need be kept in West Virginia is a distinct advantage. Delaware's law requiring the stock ledger to be kept there<sup>220</sup> results in considerable annoyance. In West Virginia, too, the statute permits cumulative voting,<sup>221</sup> and the action of the directors may be valid without calling a regular meeting of the board.<sup>222</sup> The advantage seems to lie with the state of West Virginia, although consideration should be given to the fact that Delaware does not impose an inheritance tax upon non-residents, while West Virginia does.\*

§ 117. We are now brought to a comparison between the laws of New York and West Virginia, as between these two states must lie our final choice. New York adopted its present law after that of West Virginia had been for some time in practical operation, and borrowed from it many of its salutary provisions. Most of the advantages which would inure under the West Virginia laws are to be found in New York also. Under the laws of New York no debt can be incurred until

<sup>216</sup> Code W. Va. 1899, c. 54, § 7, as amended; *Id.*, c. 53, § 25.

<sup>217</sup> Code W. Va. 1899, c. 53, § 49.

<sup>218</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 9.

<sup>219</sup> Code W. Va. 1899, c. 53, § 49.

<sup>220</sup> General Corporation Law Del. (Laws 1901-03, c. 394) § 29.

<sup>221</sup> Code W. Va. 1899, c. 53, § 44.

<sup>222</sup> *Id.* § 51, as amended (Acts 1901, p. 100, c. 35, § 16).

\* Gen. Corp. Law Del. (Laws 1901-03, c. 394) § 16; W. Va. Act approved Feb. 22, 1913.

\$500 shall have been paid in, and one-half of the capital stock must be paid in within one year from the date of incorporation.<sup>223</sup> In West Virginia a corporation may embark in business with practically no capital.<sup>224</sup> In this respect the provisions of the New York law are more burdensome. Our contemplated company, however, proposes to do a *bona fide* business, and it may not be unreasonable to require that \$50,000 shall be paid in within one year. If this seems difficult, it will be easy to incorporate with a smaller capital and subsequently increase it. The liability imposed upon the directors is, perhaps, a little more stringent under the New York laws,<sup>225</sup> and the character of the books and annual reports required may be somewhat more elaborate.<sup>226</sup> The expense of organization is slightly less under the New York law.<sup>227</sup> In New York a voting trust is authorized,<sup>228</sup> and stock may be issued without par value,<sup>229</sup> neither of which features appears to have been allowed by West Virginia legislation, though in West Virginia the directors are authorized to take valid action without calling a regular meeting of the board.<sup>230</sup> New York no longer levies an inheritance tax upon nonresidents, whereas West Virginia

<sup>223</sup> New York Business Corporation Law, §§ 2, 3, 5; 1 Birdseye's Cum. & Gil. Cons. Laws N. Y. pp. 506, 509, 511.

<sup>224</sup> See *supra*, § 116.

<sup>225</sup> 5 Birdseye's Cum. & Gil. Cons. Laws N. Y. pp. 5754-5756; Code W. Va. 1899, c. 53, § 40.

<sup>226</sup> 5 Birdseye's Cum. & Gil. Cons. Laws N. Y. pp. 5758, 5763, 5850; Code W. Va. 1899, c. 32, § 88, as amended (Acts 1901, p. 114, c. 35, § 36); *Id.* c. 53, § 46, as amended (Acts 1901, p. 98, c. 35, § 12).

<sup>227</sup> 5 Birdseye's Cum. & Gil. Cons. Laws N. Y. p. 5944, Supplement 1911, p. 810; Code W. Va. 1906, c. 32, §§ 124, 129, 131, as amended (Acts 1905, c. 36, §§ 128, 129, 131; Acts Sp. Sess. 1907, c. 16; Acts Sp. Sess. 1907, c. 9, § 2, as amended by Acts 1911, c. 57).

<sup>228</sup> 2 Birdseye's Cum. & Gil. Cons. Laws N. Y. p. 1990.

<sup>229</sup> Laws N. Y. 1912, c. 351.

<sup>230</sup> Code W. Va. 1906, c. 53, § 51, as amended (Acts 1901, p. 100, c. 35, § 16).

now does so.† The author believes that, even if a foreign corporation was allowed to come into New York and operate without any particular restrictions, a company chartered in New York would have greater advantages than one chartered in West Virginia.

§ 118. If a West Virginia charter should be obtained, it would seem that the fees paid that state for the privilege of incorporating and conducting business in the state of New York would be wasted. If the corporation had originally organized under the New York laws, the initial expense would be about \$62.<sup>231</sup> If it should be organized under the West Virginia laws, it would have to pay an initial expense of about \$77,<sup>232</sup> and in addition would be required to pay to the state of New York for the privilege of doing business there, within thirteen months after commencing its operations in that state, a license fee of one-eighth of one per cent. on the amount of the capital stock employed by it in New York during the first year of its business in that state,<sup>233</sup> which in the case supposed would be \$125, plus the fee payable to the Secretary of State for filing its papers and issuing a certificate of authority, amounting to \$11. In other words the initial expense would be over \$200 if organized in West Virginia, as against about \$62 if organized in New York. Then, too, aside from the annual tax to be paid the state of West Virginia, this corporation must pay to the state treasurer of New York an annual tax similar to that paid by domestic corporations, to be computed upon the basis of the capital actually employed in New York.<sup>234</sup> Should a foreign corporation fail to pay the license fee re-

†Laws N. Y. 1911, c. 732, § 1; W. Va. Act approved Feb. 22, 1913.

<sup>231</sup> See chapter VII, § 88 (11).

<sup>232</sup> See chapter VII, § 94 (11).

<sup>233</sup> New York Tax Law (5 Consol. Laws 1909, c. 62) § 181, as amended by Laws 1910, c. 340.

<sup>234</sup> Id. § 182; *People ex rel. New England Dressed Meat & Wool Co. v. Roberts*, 155 N. Y. 408, 50 N. E. 53, 41 L. R. A. 228.

quired and fail to obtain the certificate of authority to do business, it is forbidden to maintain any action in New York upon any contract made by it in that state.<sup>235</sup> It has been held by the Supreme Court of the United States, however, that this statute does not prevent a suit upon such a contract in the federal courts.<sup>236</sup>

§ 119. Aside from this, every corporation organizing elsewhere than in the state where it is to do business will very soon realize the stringent laws generally prevailing relating to attachment. A nonresident is usually subject to attachment at the commencement of every suit at law based upon a money demand.<sup>237</sup> We have already seen that a corporation organized in a state other than that of its business habitat is classed as a nonresident.<sup>238</sup> It has, therefore, resulted that vexatious attachments have been frequently sued out against solvent corporations, based upon purely fictitious demands, asserted merely for the purpose of levying blackmail or forcing a compromise, to the very great detriment of the prosperity of these corporations. The force of these remarks has been demonstrated by the frequency of such proceedings during financial panics. This menace is sufficient in itself to outweigh many other great advantages which might be obtained by a foreign charter.

§ 120. Our conclusion, therefore, is that, for the purposes suggested at the commencement of this chapter, the laws of

<sup>235</sup> General Corporation Law, § 15 (2 Birdseye's Cum. & Gil. Cons. Laws N. Y. p. 1979).

<sup>236</sup> *David Lupton's Sons' Co. v. Automobile Club of America*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177.

<sup>237</sup> *Barbour v. Paige Hotel Co.*, 2 App. D. C. 174; *Ocean Ins. Co. v. Portsmouth Marine Ry. Co.*, 44 Mass. (3 Metc.) 420; *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. (Pa.) 173; *Cowardin v. Universal Life Ins. Co.*, 73 Va. 445; *Hall v. Bank of Virginia*, 14 W. Va. 584; 3 Clark & M. Corp. p. 2336; 4 Cyc. 430.

<sup>238</sup> See chapter VI, § 74.

the state of New York are best calculated to afford the protection and privileges desired.

§ 121. A good deal of space has been devoted to determining the state of the parentage of our suggested corporation, the purpose having been to indicate in a very general way only the line of reasoning to which resort must be had in order to correctly solve the problem in any given case. The author disclaims any purpose to prefer the New York laws over those of other jurisdictions in any case other than that stated at the outset of this chapter.

## CHAPTER VIII

## INCORPORATORS

- § 122. Who may be Incorporators.
- 123. 1. Nonresidents.
- 124. 2. Aliens.
- 125. 3. Infants.
- 126. 4. Married Women.
- 127. 5. Corporations.
- 128. Number of Incorporators.
- 129. Dummy Incorporators.
- 130. Incorporators as Stockholders.
- 131. Functions of Incorporators.

## § 122. Who may be Incorporators.

At the outset counsel might be called upon to determine who may be incorporators under the laws of the particular jurisdiction chosen.

## § 123. Nonresidents.

In the preceding chapter we have considered briefly the general provisions of the various state statutes relating to the residences of incorporators. If the statute contains no prohibition upon a nonresident becoming an incorporator, it has been decided that he may legally become such.<sup>1</sup>

## § 124. Aliens.

Based upon the principles of the law of contracts, alien *enemies* cannot become incorporators;<sup>2</sup> but there is no common-law restriction upon alien *friends* becoming so, even in those

<sup>1</sup> *Humphreys v. Mooney*, 5 Colo. 282; *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. (N. Y.) 186; *In re Charter of School Ass'n of Tamaqua*, 1 Leg. Rec. Rep. (Pa.) 133.

<sup>2</sup> 10 Cyc. 165.

jurisdictions where the laws forbid the holding of real estate by aliens, and the only object of the corporation is to hold and convey real property.<sup>3</sup> This is because the corporation has an entirely different legal entity from the individuals organizing or holding stock in it. *The title to the property is in the corporation*, which, if it is not organized under a foreign law, is not considered an alien. The result of this principle is that, notwithstanding a state may prohibit the holding of real property by aliens, a number of persons, all of whom are aliens, might come to that state and take out a charter which would enable the corporation which they organize, and which they exclusively control, to acquire and hold such real estate as they see fit, and in this way the object of the law may be defeated. For this reason certain states have enacted legislation forbidding more than a certain percentage of stock to be held by aliens.<sup>4</sup>

### § 125. Infants.

A charter being in the nature of a contract between the individual incorporators and the state,<sup>5</sup> the same reasons that prevent an infant from entering into a binding contract prevent him from becoming an incorporator,<sup>6</sup> although, if it should happen that a corporation should be organized with one of its incorporators an infant, under the ordinary rule that a contract

<sup>3</sup> Princeton Mining Co. v. First Nat. Bank of Butte, 7 Mont. 530, 19 Pac. 210.

<sup>4</sup> Code of Laws D. C. 1901, § 397 (Act March 3, 1901, c. 854, 31 Stat. 1252, amended by Act June 30, 1902, c. 1329, 32 Stat. 530); Code Iowa, 1897, § 2889; Rev. St. Mo. 1899, § 4765; Const. Wash. art. 2, § 33; St. Wis. 1898, § 2200a; State ex rel. Winston v. Hudson Land Co., 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430.

<sup>5</sup> Dartmouth College v. Woodward, 4 Wheat. (U. S.) 518, 4 L. Ed. 629; Branch v. Baker, 53 Ga. 502; Crease v. Babcock, 40 Mass. (23 Pick.) 334, 34 Am. Dec. 61; Pierce v. Emery, 32 N. H. 484; People v. Albany & V. R. Co., 37 Barb. (N. Y.) 216.

<sup>6</sup> Phillips v. Covington & Cincinnati Bridge Co., 2 Metc. (Ky.) 219; Matter of Globe Mut. Ben. Ass'n, 135 N. Y. 280, 284, 32 N. E. 122, 17 L. R. A. 547; 1 Cook, Corp. § 67.

by an infant is not void, but voidable only by him, such a corporation might still have a legal existence.<sup>7</sup>

### § 126. Married Women.

Under the common law, married women, having no contractual power, could not become incorporators.<sup>8</sup> It is believed that there is now no state in which this common-law doctrine has not been changed by statute. Where a married woman is competent to contract as a feme sole there is no reason why she cannot become an incorporator.<sup>9</sup>

### § 127. Corporations.

While a corporation is frequently permitted *by statute* to hold stock in another corporation after that other corporation has once been organized, still it has been held that a corporation, in the absence of specific authority to that effect, cannot become an *incorporator* in another company.<sup>10</sup> It cannot even

<sup>7</sup> Dunton v. Brown, 31 Mich. 182; Kerr v. Bell, 44 Mo. 120; In re Nassau Phosphate Co., 2 Ch. Div. 610.

<sup>8</sup> Witters v. Sowles (C. C.) 38 Fed. 700; Liberty Tp. Draining Ass'n v. Watkins, 72 Ind. 459; Bruner v. Thiesner, 12 Mo. App. 289.

<sup>9</sup> Keyser v. Hitz, 2 Mackey (D. C.) 473, reversed on another point in Hitz v. National Metropolitan Bank, 111 U. S. 722, 4 Sup. Ct. 613, 28 L. Ed. 577.

<sup>10</sup> McAlester Mfg. Co. v. Florence Cotton & Iron Co., 128 Ala. 240, 30 South. 632; Martin v. Ohio Stove Co., 78 Ill. App. 105; Converse v. Emerson, Talcott & Co., 148 Ill. App. 604, judgment affirmed 242 Ill. 619, 90 N. E. 269; Newland Hotel Co. v. Lowe Furniture Co., 73 Mo. App. 135; Nebraska Shirt Co. v. Horton, 3 Neb. (Unof.) 888, 93 N. W. 225; Central R. Co. of New Jersey v. Pennsylvania R. Co., 31 N. J. Eq. (4 Stew.) 475; Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; Smith v. Newark S. & S. R. Co., 8 Ohio Cir. Ct. R. 583; Valley Ry. Co. v. Lake Erie Iron Co., 46 Ohio St. 44, 18 N. E. 486, 1 L. R. A. 412; McCampbell v. Fountain Head R. Co., 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731; Denny Hotel Co. of Seattle v. Schram, 6 Wash. 134, 32 Pac. 1002, 36 Am. St. Rep. 137; 1 Cook, Corp. § 64.

become a stockholder in another company after incorporation unless allowed by charter or governing statute,<sup>11</sup> although, where it is obliged to take stock in another existing corporation in order to secure itself against loss, this has been permitted.<sup>12</sup>

### § 128. Number of Incorporators.

The statutes usually designate the number of persons necessary to organize a corporation, and in such case a charter will not be approved where those seeking the corporate franchise are less in number than the statute requires.<sup>13</sup> One person cannot become a business corporation, even under a statute which fails to limit the number of incorporators and provides that "any number of persons may associate themselves together" for such a purpose.<sup>14</sup> This difficulty may, however, be circumvented in practice by having this one individual associate with himself friends, who take a few shares each, thus

<sup>11</sup> *De La Vergne Refrigerating Mach. Co. v. German Savings Institution*, 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 66; *Easun v. Buckeye Brewing Co. (C. C.)* 51 Fed. 156; *Lester & Halton v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Central R. Co. v. Collins*, 40 Ga. 582; *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N. E. 798, 8 L. R. A. 497, 17 Am. St. Rep. 319; *People ex rel. Moloney v. Pullman's Palace Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366; *McCoy v. World's Columbian Exposition*, 87 Ill. App. 605, judgment affirmed 186 Ill. 356, 57 N. E. 1043, 78 Am. St. Rep. 288; *Hunt v. Hauser Malting Co.*, 90 Minn. 282, 96 N. W. 85; *MacGinniss v. Boston & M. Consol. Copper & Silver Mining Co.*, 29 Mont. 428, 75 Pac. 89.

<sup>12</sup> *Fidelity Ins. Co. v. German Sav. Bank*, 127 Iowa, 591, 103 N. W. 958; *Howe v. Boston Carpet Co.*, 82 Mass. (16 Gray) 493; *Milbank v. New York L. E. & W. R. Co.*, 64 How. Prac. (N. Y.) 20; *Hyde v. Equitable Life Assur. Soc. of United States*, 116 N. Y. Supp. 219, 61 Misc. Rep. 518.

<sup>13</sup> *In re Germania Sangerbund (Com. Pl.)* 12 Pa. Co. Ct. R. 89; *Id.*, 2 Pa. Dist. R. 73.

<sup>14</sup> *Louisville Banking Co. v. Eisenman*, 94 Ky. 83, 21 S. W. 531, 1049, 19 L. R. A. 684, 42 Am. St. Rep. 335.

giving him a sufficient number of incorporators to comply with the law.<sup>15</sup> Where an attempt is made in good faith to organize a private corporation by colorable proceedings approved by the proper state authorities, and the paper intended to be the certificate of incorporation is duly admitted to record, and where these steps are followed by an uninterrupted and unchallenged user of the supposed franchise for a considerable period, valuable rights and interests having been in good faith acquired and enjoyed by such organization acting as a body corporate, it will be considered a corporation *de facto* and its corporate capacity cannot be questioned in a private suit in which it is a party.<sup>16</sup>

### § 129. Dummy Incorporators.

It is quite a common practice, particularly in those states which seem to have framed their laws with the object of inducing intending incorporators to avail themselves of the franchise conferred by such states, for the incorporators to be mere figureheads, having no real interest in the company whatever, but organizing for the benefit of the real parties in interest, to whom they subsequently assign their rights. The United States Steel Corporation was organized in this way.<sup>17</sup> This method is, of course, useful when it is desired to prevent the public from knowing who is really managing the enterprise. But in these days, when the spirit of publicity in corporate acts is widely favored, such a scheme is hardly desirable. It is

<sup>15</sup> *Munkittrick v. Perryman*, 74 L. T. Rep. (N. S.) 149; *Salomon v. Salomon & Co.*, 66 L. J. Ch. 35, 75 L. T. Rep. (N. S.) 426, 4 Manson, 89.

<sup>16</sup> *Farmers' Loan & Trust Co. v. Toledo, A. A. & N. M. Ry. Co.*, (C. C.) 67 Fed. 49; *State v. Byrne*, 45 Conn. 273; *Thompson v. Candor*, 60 Ill. 244; *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552; *Haas v. Bank of Commerce*, 41 Neb. 754, 60 N. W. 85; *Attorney General ex rel. Pattee v. Stevens*, 1 N. J. Eq. (Saxt.) 369, 22 Am. Dec. 526; *Buffalo & A. R. Co. v. Cary*, 26 N. Y. 75; *Society Perun v. City of Cleveland*, 43 Ohio St. 481, 3 N. E. 357; *Same v. Hay*, *Id.*

<sup>17</sup> See chapter X, § 191.

convenient, when the real parties in interest live in another state, and do not care to journey to the jurisdiction granting the charter in order to comply with the formalities incident to the first meeting. In such a case these dummy incorporators organize the company, and afterwards assign their rights to those entitled, who thereupon proceed to elect; at their own convenience and in their own way, the officers who are really to be in control. Sometimes dummy incorporators are resorted to, upon the supposition that the real owner of the corporate interest nominally held by the dummies will thereby escape any possible corporate liability for unpaid stock. This, however, is a fallacy. While the dummy himself may be liable for any amount unpaid,<sup>18</sup> his principal may also be held.<sup>19</sup>

### § 130. Incorporators as Stockholders.

The state statutes generally require that the incorporators shall be stockholders. It is not necessary that each of them shall subscribe for any considerable amount, but it would seem to be an absurdity to permit persons who are to have no financial interest whatever in the proposed company, even nominal, or for the benefit of some one else, to organize and thus avail themselves of the franchise.<sup>20</sup> The states of Oregon, Pennsylvania, South Dakota, and Tennessee apparently do not require incorporators to be stockholders.<sup>21</sup>

<sup>18</sup> *In re Reciprocity Bank*, 22 N. Y. 9; *Wakefield v. Fargo*, 90 N. Y. 213; *Barrett's Case*, 4 De G., J. & S. 416; *Ex parte Bugg*, 2 Dr. & Sm. 452.

<sup>19</sup> *Pauly v. State Loan & Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, 41 L. Ed. 844; *Borland v. Haven* (C. C.) 37 Fed. 394; *National Foundry & Pipe Works v. Oconto Water Co.* (D. C.) 68 Fed. 1006; *Dunn v. Howe*, 107 Fed. 849, 47 C. C. A. 13; *Castleman v. Holmes*, 4 J. J. Marsh. (Ky.) 1; *Barron v. Burrill*, 86 Me. 72, 29 Atl. 938.

<sup>20</sup> *People ex rel. Plumas County v. Chambers*, 42 Cal. 201; *Dancy v. Clark*, 24 App. D. C. 487; *Mitchell v. Rome R. Co.*, 17 Ga. 574.

<sup>21</sup> *Coyote Gold & Silver Mining Co. v. Ruble*, 8 Or. 284; *Densmore Oil Co. v. Densmore*, 64 Pa. 43; *Singer Mfg. Co. v. Peck*, 9 S. D. 29, 67 N. W. 947; *Bristol Bank & Trust Co. v. Jonesboro Banking Trust Co.*, 101 Tenn. 545, 48 S. W. 228.

## § 131. Functions of Incorporators.

After the persons named as incorporators in the certificate of incorporation have duly signed and acknowledged the articles as required by statute, in some states public notice must be given of the proposed organization.<sup>22</sup> Of course, the incorporators, or some one on their behalf, should see that this notice is in strict conformity with the state legislation,<sup>23</sup> and that any other steps made mandatory by the law are taken, as, for instance, opening books to receive stock subscriptions<sup>24</sup> and payment of incorporation fees.<sup>25</sup> It is their duty to see that the initial meeting of the incorporators is held, and that all steps are taken at this meeting which are reasonable or proper.<sup>26</sup> From the instant that the incorporators become bound as subscribers to the stock, while possibly they are not, in a narrow interpretation of the word, at that time stockholders, nevertheless they are in contemplation of law entitled to all the rights and subject to all the liabilities of stockholders.<sup>27</sup>

<sup>22</sup> *Seaton v. Grimm*, 110 Iowa, 145, 81 N. W. 225; *Heinig v. Adams & Westlake Mfg. Co.*, 81 Ky. 300, 5 Ky. Law Rep. 281.

<sup>23</sup> *Berkson v. Anderson*, 115 Iowa, 674, 87 N. W. 402; *National Shutter Bar Co. v. G. F. S. Zimmerman & Co.*, 110 Md. 313, 73 Atl. 19; *Unity Ins. Co. v. Cram*, 43 N. H. 636; *In re Enterprise Mutual Beneficial Ass'n*, 32 Leg. Int. (Pa.) 82.

<sup>24</sup> *Shurtz v. Schoolcraft & T. R. R. Co.*, 9 Mich. 269; *Parker v. Northern Cent. M. R. Co.*, 33 Mich. 23.

<sup>25</sup> *Union Horse Shoe Works v. Lewis*, Fed. Cas. No. 14,365, 1 Abb. U. S. 518; *Cleaveland v. Mullin*, 96 Md. 598, 54 Atl. 665; *People v. Cook*, 10 N. Y. St. Rep. 650; *In re Incorporation of Union A. M. E. Church of Westchester*, 1 Chest. Co. Rep. (Pa.) 459.

<sup>26</sup> See chapter XI.

<sup>27</sup> *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179; *Wemple v. St. Louis J. & S. R. Co.*, 120 Ill. 196, 11 N. E. 906; *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814; *In re Culver's Estate*, 145 Iowa, 1, 123 N. W. 743, 25 L. R. A. (N. S.) 384; *Business Men's Ass'n v. Williams*, 137 Mo. App. 575, 119 S. W. 439; *Beals v. Buffalo Expanded Metal Const. Co.*, 49 App. Div. 589, 63 N. Y. Supp. 635; *Commonwealth v. Central Pass. R. Co.*, 52 Pa. 506.

## CHAPTER IX

## CAPITALIZATION

- § 132. Definition.
- 136. How to Determine the Amount of Capital Stock.
- 137. Good Will.
- 139. Capitalization as Dependent upon Earnings.
- 141. Dangers of Overcapitalization.
- 146. Dangers of Undercapitalization.
- 148. Preferred Stock.
- 149. Share Value.
- 150. Bond Issue.

## § 132. Definition.

The public generally understands the capital of a corporation to be the face value of all the stocks and bonds which it is authorized to issue. In a true sense this is not the capital of a corporation at all. There is a wide difference between the actual stock, and the potential stock; that is, the stock allowed by the charter, but which has not been issued.<sup>1</sup> Inasmuch as the capital of a corporation may be fixed at a large amount, and the business commenced with but a small part of it actually paid in, the temptation is great with promoters to inflate the importance and solidity of the corporation in the eyes of the public by establishing the capital at a high figure. The actual amount subscribed or paid in may be inconsiderable, but the unthinking public may be deceived by the grandiose character of the prospectus.

§ 133. Legally speaking, only so much of the capital as is actually subscribed may be properly called its capital stock;<sup>2</sup>

<sup>1</sup> *Continental Securities Co. v. Interborough Rapid Transit Co.* (C. C.) 165 Fed. 945. *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Stemple v. Bruin*, 57 Fla. 173, 49 South. 151; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

<sup>2</sup> *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

and of the amount subscribed only a small portion may be paid in, a fact which will go still further towards reducing the actual stock for working purposes. The subject of issuing stock for less than par will be treated in another chapter.<sup>3</sup> Whether it is or is not legal to do this, the fact is that stock is very frequently issued for less than par, with a contract between the corporation and its stockholders not to call for further payments; so that the amount subscribed is no real criterion of the amount of money available for treasury purposes.

§ 134. Furthermore, the bonds of the corporation may be and often are sold for less than par;<sup>4</sup> so that the face value of its bonds issued does not necessarily mean that that amount of money has gone into its treasury.

§ 135. In order, therefore, to determine what the actual capital of a corporation is, the amount of money which has actually gone into its treasury must be ascertained.

#### § 136. How to Determine the Amount of Capital Stock.

The honest promoters, who desire to bona fide place upon the market corporate securities which will be readily salable and at the same time represent actual value paid in, must consider a number of things. Primarily it would seem that the logical and easy method of determining the value of the capital stock of any corporation would be to ascertain the real value of its assets and issue stock to that amount. But this may not be so simple a proposition as it would seem. The tangible assets, such as real estate and personal property, may be readily determined. The value of leases and patent rights

<sup>3</sup> See chapter XIX, §§ 399-405.

<sup>4</sup> *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375; *Traders' Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 3 S. E. 363; *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *North Side Ry. Co. v. Worthington*, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778; 10 Cyc. 1169; 3 Cook, Corp. § 776, and note.

may not prove difficult to fix. But a business corporation, taking over an existing business, may have an asset outside of and much more valuable than any of these, to wit, the good will of the business. How to properly value this may be a conundrum. Different persons, with the most honest intentions in the world, may arrive at widely divergent conclusions in the effort to accomplish this. Here, then, is an opportunity for watering stock which may result in financial ruin to the stockholders and the creditors.

### § 137. Good Will.

A business concern would be foolish to ignore the monetary value of the good will of a going business. That it is legal to consider this in determining the capitalization has been decided by our courts, including the Supreme Court of the United States, which, speaking through Mr. Justice Brewer, himself a master of corporation law, uses the following language:<sup>b</sup>

§ 138. "The value of property, generally speaking, is determined by its productiveness—the profit which its use brings to the owner. Various elements enter into this matter of value. \* \* \* The value, therefore, is not determined by the mere cost of construction, but more by what the completed structure brings in the way of earnings to its owner."

### § 139. Capitalization as Dependent upon Earnings.

It is therefore evident that a corporation has a legal right to adopt the general practice of having its capital represent, not only the tangible property and franchises, but its earning capacity as well. Two corporations, side by side, having identically the same property and franchises, but managed by different sets of men, might well be justified in fixing their capi-

<sup>b</sup> *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 13 Sup. Ct. 622, 37 L. Ed. 463; see chapter XIX, § 400.

tal at amounts differing each from the other. The prudent corporation will remember, however, that it is not safe to pay out all of its net earnings in dividends. Something must be put aside for depreciation, and it is not uncommon in the best managed companies to put aside each year an average reserve as high as 50 per cent. for repairing or improving the equipment or enlarging the business. If all is not needed for this purpose, it would not be amiss to set a portion aside as a surplus fund, so that in the less productive years the dividend may be constantly maintained, aided by the income from the surplus investments.

§ 140. A careful estimate should be made of the probable earning capacity of the corporation, as well as of the expenses likely to be incurred. The net earnings being thus determined, a deduction should then be made of the amount which should be set aside annually as a reserve. The balance may be taken to be the dividend which the company will be enabled to pay. The capital may be estimated upon the basis of this probable dividend, a method which has received the approval of many of the best minds in the financial world.

### § 141. Dangers of Overcapitalization.

#### (1) The Tax Laws.

In some states the initial and annual taxation is based upon the amount of stock, not actually issued and outstanding, but *authorized*,<sup>6</sup> in which event it would be worse than foolish to fix the authorized capital at an amount largely in excess of that which will be required for the needs of the present and the immediate future. Not only must the laws of the parent state be examined and considered, but also the laws of every other state or jurisdiction where the corporation proposes to do business. A tax may be imposed as a condition of admit-

<sup>6</sup> West Virginia Corp. Law, c. 19, §§ 4, 6.

ting the corporation to do business in another state, based upon the *authorized* capital, although in the parent state the basis is the capital actually issued and outstanding.<sup>7</sup>

§ 142. But this does not apply to a corporation engaged in interstate business. Prior to 1910 the state of Kansas,<sup>8</sup> as well as a number of other states, required foreign corporations, before doing business in that state, to pay to its state treasurer for the benefit of the permanent school fund, a charter fee upon a sliding scale based upon its entire authorized capital. The Western Union Telegraph Company refused to pay this fee, and the state filed an action against it to oust it from its limits. The Supreme Court of the United States held that the state could not, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits, although it might tax the corporation's property permanently located within the state, where the ascertainment of the amount assessed is made dependent in fact upon the value of its property situated within its borders.<sup>9</sup> Since this decision it is believed that the states have generally changed their laws and practice so as to conform with this ruling of the Supreme Court of the United States. The effort of a state to tax the authorized capital has sometimes been circumvented by issuing more bonds and less stock in order to

<sup>7</sup> *Liverpool & London Life & Fire Ins. Co. v. Massachusetts*, 77 U. S. (10 Wall.) 566, 19 L. Ed. 1029; *Western Union Telegraph Co. v. Lieb*, 76 Ill. 172; *Attorney General v. Bay State Mining Co.*, 99 Mass. 148, 96 Am. Dec. 717.

<sup>8</sup> Gen. St. Kan. 1901, title "Corporations," p. 280; Gen. St. Kan. 1905, p. 284.

<sup>9</sup> *Western Union Telegraph Co. v. Kansas ex rel. Coleman*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355; *Pullman Co. v. Kansas ex rel. Coleman*, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378; *Ludwig v. Western Union Telegraph Co.*, 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423; *H. K. Mulford Co. v. Curry* (Cal.) 125 Pac. 236.

raise sufficient money for the corporate needs. More will be said later as to the comparative advantages and disadvantages of bond issues.<sup>10</sup>

### § 143. (2) Attracting Rivals.

It is frequently claimed that overcapitalization by a successful corporation excites so much attention that rivals are induced to believe that with a small plant they can successfully compete and make large profits. Whether this is or is not sound from the standpoint of human experience, it may be well for prospective incorporators to give some thought to this.

### § 144. (3) Unissued Stock.

A very practical danger in having a large amount of unissued stock in the treasury is that the board of directors may at any time determine that the needs of the corporation require that this stock shall be placed upon the market, with the effect that the stock already held may be thereby depressed in value. When the corporation really requires it, it is generally not a difficult matter to so amend the charter as to provide for an increase of stock.<sup>11</sup>

### § 145. (4) Partly Paid Stock.

It is doubtful whether, except in small corporations, it is wise to issue partly paid stock to be paid for on the installment plan. Calls for payments are usually made at a time when the corporation cannot obtain money through regular channels. It follows that the stockholders themselves might find the same difficulty in meeting the calls, with the result that their stock may be thrown upon the market, thus divesting them of their own holdings, and affecting the value of the holdings of every other stockholder who is able to pay.

<sup>10</sup> See *infra*, §§ 150-153.

<sup>11</sup> See chapter XXIV, § 518.

## § 146. Dangers of Undercapitalization.

## (1) Regulation by State.

While a small corporation with a stock held in a close coterie of persons may perhaps wisely fix its capitalization at considerably less than the true value of its assets, and thus escape state taxation in that way, for a public service corporation, which may be subject to the whims of the Legislature, the payment of a large dividend is apt to attract so much attention as to call for drastic legislation regulating the amount of these dividends. Should the capital be placed upon the correct basis, the dividend might be the ordinary and proper one, and excite no comment whatsoever.

## § 147. (2) Salability of Stock.

It is quite desirable, in issuing stock, to have in mind the probable desire on the part of the investing public to purchase it and to have it so regulated in price that the holder may receive true value for it. A corporation having a capital of \$100,000 and paying an 8 per cent. dividend may be able to sell its stock at par. Should the same corporation be capitalized at \$50,000, so that its dividend would be 16 per cent., it is a well-known fact that its stock would not sell at 200, but would probably average about 175 to 180. The stockholder, therefore, by the mere fact of undercapitalization, would be the loser to this extent.

## § 148. Preferred Stock.

It is a very common practice for corporations to issue both preferred and common stock.<sup>12</sup> The preferred stock may be issued for the actual value of the property, which may be readily appraised. The common stock will be issued for an amount in excess of this, based upon the value of the company's business, as estimated from its earning capacity after

<sup>12</sup> See chapter XVIII, §§ 374, 380.

the payment of the interest on its bonds and dividends on whatever preferred stock may have been issued.

### § 149. Share Value.

It probably makes comparatively little difference what the share value of the stock may be. The usual par value is 100. Sometimes, as in the case of Pennsylvania Railroad stock, it is 50. Sometimes it is 10, and in some instances the par value of stock has been placed as low as \$1. When shares are placed at this figure, it is generally found that the corporation is a wild-cat scheme to induce people with small means to buy stock in a fraudulent enterprise promising great returns. The knowledge that they own several thousand shares, instead of  $\frac{1}{100}$  of that number, seems to impress them with the idea that vast riches are within their grasp. If it is desired to throw open the stock holdings in a corporation to a vast number of people, a low share value may be expedient. Otherwise, the usual par value of 100 is probably the part of better judgment.

### § 150. Bond Issue.

Money may be raised either by an issue of bonds or of stock. Whether it is desirable to raise a portion of the required capital by the sale of bonds may well be the subject of careful study. It is a law of economics that a large issue of bonds lessens the value of the stock, just as a large issue of preferred stock lessens the value of the common. A distinction must be noted between the obligation to pay interest on bonds and to pay dividends on stock. The former duty is absolute. If the interest is not paid when due, a foreclosure under the mortgage securing the bonds may be had. On the other hand, if the company is not able to pay dividends, the stockholders are without redress,<sup>18</sup> except that at the next election they may, if they see fit, elect another board of directors, who will so manage the company's affairs as to en-

<sup>18</sup> See chapter XX, § 409.

able it to earn sufficient to pay a dividend. From this standpoint a bond issue is not wise; but it must be borne in mind that money may frequently be borrowed at a lower rate of interest on bonds than a stockholder would expect to receive as a dividend on his stock. A corporation may by a bond issue so turn over the money borrowed as to realize a maximum profit on it, which will go back to its stockholders.

§ 151. It may be that the company is designedly not paying dividends, but instead is building up a surplus, with a view of putting the business upon a stable basis. This is a good financial policy, and one which will eventually make the stock very valuable. But the immediate result will almost inevitably be that the stock will sell below par on the market. Should the additional capital be realized by the issue of new stock, those who are already stockholders will, of course, be damaged. The money might be raised by the sale of bonds, and turned over at such a profit as to materially aid in the upbuilding of the surplus, and result in the quicker payment of dividends.

§ 152. A bond issue, rather than an increase of stock, is often desirable, where the outside public is to be appealed to for funds and the corporation is sure of its ability to promptly meet its bonded obligations. The money, being obtained at a low rate of interest, can be advantageously used.

§ 153. Where the corporation is not so sure of being able to pay interest on its bonded debt, the mischief of selling bonds is not so great where the entire issue can be taken and held by the stockholders themselves. Their stockholding interest will doubtless cause them to refrain from exercising their right to sell the corporation's assets for default in payment of the bonds.

## CHAPTER X

## CERTIFICATE OF INCORPORATION

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#### § 154. Contents of Certificate.

The various state statutes prescribe with detail what must be stated in the certificate of incorporation. All of the required information should be incorporated in it. In addition, it is usually permissible to insert such other provisions, not contrary to law or public policy, as may be desired to govern the rights of the stockholders among themselves. No objection can reasonably be made to doing this. Each stockholder purchases his holdings with actual or constructive notice of the extent of the powers of the company, and the manner in which those powers are to be exercised, and he can hardly be heard to object, therefore, to any of the stipulations to which, by becoming a stockholder, he has voluntarily made himself a party.<sup>1</sup>

<sup>1</sup> Upton v. Tribilcock, 91 U. S. 45, 23 L. Ed. 203; Weatherly v. Medical & Surgical Society of Montgomery County, 76 Ala. 567; Bates v. Wilson, 14 Colo. 140, 24 Pac. 99; Schickler v. Washington Brewing Co., Ltd., 33 App. D. C. 35; Bent v. Underdown, 156 Ind. 516, 60 N. E. 307; Heald v. Owen, 79 Iowa, 23, 44 N. W. 210; Traer v. Lucas Prospecting Co., 124 Iowa, 107, 99 N. W. 290; Union Bank of Louisiana v. Guice, 2 La. Ann. 249; Cummings v. Webster, 43 Me. 192; Swartwout v. Michigan Air Line R. Co., 24 Mich. 389; Rochester Ins. Co. v. Martin, 13 Minn. 59 (Gil. 54); Kean v. Johnson, 9 N. J. Eq. 401; Loewenthal v. Rubber Reclaiming Co., 52 N. J. Eq. 440, 28 Atl. 454; Breslin v. Fries-Breslin Co., 70 N. J.

### § 155. Governing Principles.

Generally the statutes specify so plainly what should be inserted that little is needed by way of explanation to make them clearer. There are, however, some principles of law which must be borne in mind in drafting every charter, and to a few of these principles a brief allusion will be made.

### § 156. Name.

In many states the appropriation of a name already assumed by another domestic corporation is forbidden by statute; but, aside from this, it is a general principle of law that a body which first acquires the right to use a particular corporate name will be protected in the use of that name as against any other body incorporating at a later period in the same state, and assuming the same name.<sup>2</sup> This is simply a particular expression of the broad equity doctrine that unfair competition in business will be enjoined by the courts. It has been held that, where there was already in existence a corporation styled "Kansas City Real Estate & Stock Exchange," registration should be refused a new corporation under the name of

Law, 274, 58 Atl. 313; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546; *Heck v. McEwen*, 12 Lea (Tenn.) 97; *McCampbell v. Fountain Head R. Co.*, 111 Tenn. 55, 77 S. W. 1070, 102 Am. St. Rep. 731; *Ernest v. Nicholls*, 6 H. L. Cas. 401; 3 *Clark & M. Priv. Corp.* §§ 1933, 1955, 1957, 1962, 2074-2076; *Taylor, Priv. Corp.* §§ 187, 448, 541; 2 *Cook, Corp.* § 493; *infra*, § 174.

<sup>2</sup> *Newby v. Oregon Cent. Ry. Co.*, Fed. Cas. No. 10,144, *Deady*, 609; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278, 9 Am. Rep. 324; *Original La Tosca Social Club v. La Tosca Social Club*, 23 App. D. C. 96; *Most Worshipful Grand Lodge Free, Ancient, and Accepted Masons of the District of Columbia v. Grimshaw*, 34 App. D. C. 383; *Merchants' Detective Ass'n v. Detective Mercantile Agency*, 25 Ill. App. 250; *In re United States Mercantile Reporting & Collecting Co.*, 52 Hun, 611, 4 N. Y. Supp. 916; *In re First Presbyterian Church of Harrisburg*, 2 Grant, Cas. (Pa.) 240; 1 *Cook, Corp.* § 15, and cases cited; 10 *Cyc.* 150, and cases cited.

"The Kansas City Real Estate Exchange."<sup>3</sup> So, too, a mere transposition of words in the name has been held not to entitle a name so transposed to registration.<sup>4</sup> Authority is also found for the proposition that a new corporation cannot adopt the same name as an old one, with the mere addition or subtraction of the place where the business is to be carried on.<sup>5</sup>

### § 157. Use of Word "Incorporated."

The statutes sometimes require the use of the word "incorporated," either in full or abbreviated, or the words "a corporation," after the name, wherever the name is displayed on printed matter or otherwise; and, as a penalty for noncompliance, the stockholders are held liable as partners.<sup>6</sup> The state of New York has recently enacted legislation which prohibits any business corporation, foreign or domestic, doing business within the state unless some such words as "a corporation," or "incorporated," or an abbreviation thereof, are made part of the corporate name.<sup>7</sup> As most large corporations sooner or later intend to do business in New York, it would seem advisable that all corporations incorporated under the laws of any state whatsoever should hereafter have something in their names to indicate a corporate character.

<sup>3</sup> State v. McGrath, 92 Mo. 355, 5 S. W. 29.

<sup>4</sup> Altoona Gas Co. v. Gas Co. of Altoona, 17 Pa. Co. Ct. R. 662.

<sup>5</sup> Chicago Landlords' Protective Bureau v. Koebel, 112 Ill. App. 21, judgment affirmed Koebel v. Chicago Landlords' Protective Bureau, 210 Ill. 176, 71 N. E. 362, 102 Am. St. Rep. 154; Glucose Sugar Refining Co. v. American Sugar Refining Co. (N. J. Ch.) 56 Atl. 861; In re Bradley Fertilizer Co., 19 Pa. Co. Ct. R. 271.

<sup>6</sup> See Virginia Corporation Law (Laws 1902-04, c. 270, subc. 1) § 2, as amended by Laws 1910, c. 35; General Corporation Law Nev. (Laws 1903, c. 88) § 4, as amended March 14, 1905 (Laws 1905, p. 73, c. 51); General Corporation Law Del. (22 Del. Laws, p. 257) § 5; Connecticut Corporation Law (Laws 1903, c. 194) § 2.

<sup>7</sup> General Corporation Law N. Y. (Consol. Laws 1909, c. 23) § 6, as amended by Laws 1911, c. 638, and Laws 1912, c. 2; In re American Cigar Lighter Co., 77 Misc. Rep. 643, 138 N. Y. Supp. 455.

§ 158. **Objects.**

Two views have been taken by corporation lawyers with regard to stating in the charter the objects of the corporation. Some counsel prefer to set forth the objects in the most general terms possible, leaving the particular powers to be exercised to implication, upon the ground that every corporation has an implied power to do whatever is necessary to carry into effect the purposes of its creation, unless the doing of the particular thing is prohibited by law or by the charter.<sup>8</sup> In construing the doctrine of implied powers, the courts have decided that the acts which are authorized are not merely those which are indispensable and necessary to carry into effect the powers expressly recognized, but comprise all such as are appropriate, convenient, and suitable to this end. The very general expression of an object will therefore frequently be amply sufficient for all of the practical needs of the corporation. There is a danger in being more specific, in view of the doctrine that "*inclusio unius est exclusio alterius*."

§ 159. On the other hand, other counsel, quite as learned, consider that it is dangerous to leave to implication any of

<sup>8</sup> *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. (7 Pick.) 344, affirmed (1837) 11 Pet. 420, 9 L. Ed. 773, 938. The chartering of a yacht by a newspaper corporation for the purpose of collecting news concerning events connected with hostilities between the United States and Spain, by a charter party embodying an absolute obligation to return the yacht at the expiration of the term of hiring, and a stipulation as to value in the event of nonreturn, is not *ultra vires* of the corporation, as beyond the means incidental to the exercise of the power to charter. *Sun Printing & Pub. Ass'n v. Moore*, 183 U. S. 642, 22 Sup. Ct. 240, 46 L. Ed. 366; *Blanchard's Gun-Stock Turning Factory v. Warner*, 1 Blatchf. 258, Fed. Cas. No. 1,521; *Central Trust Co. v. Columbus H. V. & T. Ry. Co. (C. C.)* 87 Fed. 815; *Morris & E. R. Co. v. Mayor, etc., of City of Newark*, 10 N. J. Eq. (2 Stockt.) 352; *Ellerman v. Chicago Junction Rys. & Union Stockyards Co.*, 49 N. J. Eq. (4 Dick.) 217, 23 Atl. 287; *Madison, W. & M. Plank Road Co. v. Wauertown & P. Plank Road Co.*, 5 Wis. 173; 1 *Clark & Mar. Corp.* § 128; 10 Cyc. 1097, and cases cited.

the powers of a corporation, or, if not dangerous, for the benefit of the investing public it is better to express them in detail, so that a glance at the charter may determine absolutely and beyond question whether or not a particular act is authorized. The best expression of this view is found in the language of Judge Dill, the eminent corporation lawyer, who says in his treatise on the Corporation Law of New Jersey, at page 21:

§ 160. "This being the important part of the certificate of incorporation, great care should be taken that the objects and purposes of the company are stated in the fullest and clearest manner possible, because the company cannot undertake any business not authorized by its charter, and not even the fullest sanction given by the shareholders will make valid an act which is outside the powers of the company. Directors undertaking any such business may become personally liable for loss, and great inconvenience follows from companies having too limited powers. It is often questioned how far it is necessary to detail in extenso in the certificate of incorporation the powers of the company. The answer is plain. The balance of disadvantage decidedly attaches to too narrowly defined objects.

§ 161. "It is easier to compress, so to speak, the business of a company within the limits of large objects and broad powers, than to develop business by extension in the face of narrowly defined objects. It is better to give latitude to the objects and powers as contained in the certificate of incorporation, and to limit the powers of directors by the by-laws, than to run the risk of the subsequent insertion in the by-laws or in the minutes of the board of directors of a provision intended to meet some pressing requirements of the business, which provision may be found absolutely worthless because of variations from the terms of the certificate of incorporation.

§ 162. "It is customary to insert general words, such as, 'In general, to carry on any other business, whether manufacturing or otherwise.' But it must be understood that the

courts limit such words to operations of a nature similar to the business previously mentioned, and will not include any wholly fresh business."

§ 163. In those jurisdictions, like the District of Columbia, where a corporation may be created for a single object only,<sup>9</sup> the advice of Judge Dill applies with peculiar force. While it may be a little harder to prepare a certificate of incorporation with the powers broadly enumerated, which will be received for record, still, when recorded, if the powers named are strictly those incidental to the carrying out of the one object, it will be a protection to the corporation to have them set forth in detail.

#### § 164. Powers.

In order to prevent the application of the principle above referred to,<sup>10</sup> that the inclusion of certain powers means the exclusion of others, it is usual among those who draft certificates of incorporation, when stating the powers which the company may exercise in addition to the previously stated objects, to preface such enumeration with the following words, or those substantially similar: "In furtherance of, and not in limitation of, the general powers conferred by law, and of the objects and purposes as hereinabove stated, it is hereby expressly provided that the company shall also have the following powers; that is to say," etc.

§ 165. Many of the powers usually inserted after this language are merely what the law would confer without any express words. Some of the clauses, however, frequently contained in this portion of corporation charters, deserve consideration.

#### § 166. To Conduct Business in Other States.

In view of intimations given by certain *nisi prius* courts throwing doubt upon the power of foreign corporations to

<sup>9</sup> Dancy v. Clark, 24 App. D. C. 487.

<sup>10</sup> See *supra*, § 158.

conduct business in a domestic forum, as well as of certain state statutes, unless the charter contains an explicit permission to conduct business in some other than the parent state, the practice has sprung up, and continued, of inserting in the certificate of incorporation a clause permitting the company to transact its business and hold and convey property of every description elsewhere than in the state of its birth.<sup>11</sup> This clause, though hardly necessary,<sup>12</sup> is probably a prudent one; but it should not be so worded as to exclude the power of doing business within the parent state, for then the corporation would be declared illegal *ab initio* under the principle heretofore referred to.<sup>13</sup> In this connection it might be well to know that a state has a right to impose upon the stockholders of a foreign corporation the same personal liability for debts that it imposes upon stockholders of a domestic company, and when a corporation does business in such a state it impliedly consents to this hardship.<sup>14</sup>

### § 167. Holding Directors' Meetings Outside of the State.

In certain states this is expressly permitted by statute.<sup>15</sup> In others it is only permitted by statute where the power is stated in the charter or by-laws.<sup>16</sup> Where the statute is silent

<sup>11</sup> Comp. St. Mont. 1887, div. 5, § 449.

<sup>12</sup> *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. 459, 20 L. Ed. 199; *President, etc., of Bank of Utica v. Smedes*, 3 Cow. (N. Y.) 662.

<sup>13</sup> *Land Grant Ry. & Trust Co. v. Board of Com'rs of Coffey County*, 6 Kan. 245; chapter VI, § 72.

<sup>14</sup> *Pinney v. Nelson*, 183 U. S. 144, 22 Sup. Ct. 52, 46 L. Ed. 125.

<sup>15</sup> Rev. St. Me. 1903, c. 47, § 19; Business Corporation Law Mass. (St. 1903, c. 437) § 25; 1 Birdseye's Cum. & Gil. Ann. Laws N. Y. p. 507, § 2; General Incorporation Act Va. (Laws 1902-04, c. 270, subc. 5) § 5 (1 Va. Code 1904, p. 558, § 1105e, subd. 5); Code W. Va. 1899, c. 54, § 23, as amended by Acts 1901, c. 35, § 30 (Code 1906, c. 54, § 23); Civ. Code S. D. § 786; Nevada General Incorporation Law (Laws 1903, c. 88) §§ 4, 14, 23; Laws Md. 1908, c. 240, §§ 12, 42.

<sup>16</sup> New Jersey Corporation Act (2 Comp. St. 1910, p. 1628) § 44; Delaware Corporation Law 1901 (22 Del. Laws, pp. 268, 269) §§ 30, 32.

on the subject, the common-law rule governs. What this rule is, is somewhat difficult to decide from the adjudged cases. Mr. Cook, in his treatise on Corporation Law, lays down the law as follows:<sup>17</sup> "A meeting of the directors of a corporation may be held outside of the state creating the corporation, unless the charter or a statute expressly forbids such a meeting. The acts, proceedings, and contracts of a meeting of the board of directors held outside of the state are valid and enforceable." The late Judge Seymour D. Thompson, in his treatise on Corporations, contained in 10 *Cyclopedia of Law & Procedure*, states the rule to be diametrically opposite: "In the absence of statutory authorization for a different course, no valid meeting of directors can be held outside the state under whose legislation the corporation has been created."<sup>18</sup>

§ 168. In the case of *Galveston, H. & H. R. Co. v. Cowdrey* (1870) 11 Wall. 459, 20 L. Ed. 199, the Supreme Court of the United States held that bona fide holders of railroad bonds cannot be prejudiced by the fact that the mortgage by which they were secured was authorized at a meeting of the board of directors held outside of the state which conferred the charter privileges. The court uses the following language:<sup>19</sup>

§ 169. "No doubt, it may be true in many cases that the extraterritorial acts of directors would be held void, as in the case cited from the 14th New Jersey Chancery Reports, 383,<sup>20</sup> where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. And other cases might be put where their acts would be held void without a prohibitory statute, and it is generally true that a corporation exists only within the territory of the jurisdiction that created it. But it is well settled that a corporation may, by its agents, make contracts and transact busi-

<sup>17</sup> 2 Cook, Corp. § 713a.

<sup>19</sup> 11 Wall. 476, 20 L. Ed. 199.

<sup>18</sup> 10 Cyc. p. 783.

<sup>20</sup> *Hilles v. Parrish*.

ness in another territory, and may sue and be sued therein. It may hold land in another territory so long as the local authorities do not object. And we see no reason why it should not be estopped by the action of its directors in another territory, when the action is the basis of negotiations by which third parties have bona fide parted with their money, and the company has received the benefits of the transaction. A contrary doctrine would authorize a company to take advantage of its own wrong, and would seriously impair the negotiability and value of such securities."

§ 170. This opinion hints at a distinction which seems to be drawn by some of the cases between "constituent acts" and mere ministerial acts, with respect to which the directors are deemed to be ordinary agents of the corporation; the former, in the absence of an enabling statute, being required to be performed within the parent state, while the latter may be done anywhere.<sup>21</sup> Instances of the latter class of acts would be appointing a secretary,<sup>22</sup> or conferring power upon an agent to execute a deed.<sup>23</sup> As to this class of acts, there can be no question but that, even in the absence of statutory authority, if the power to directors to meet outside of the state is contained in the charter, no one can be heard to raise the objection.<sup>24</sup> As to the former class, while certain decisions have thrown some doubt upon the proposition, the insertion of this power in the certificate of incorporation can do no harm, and would probably make valid, at least as among the members of the corporation themselves, any act otherwise lawful which

<sup>21</sup> *Galveston, H. & H. R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459, 20 L. Ed. 199; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Aspinwall v. Ohio & M. R. Co.*, 20 Ind. 492, 83 Am. Dec. 329; 3 *Clark & M. Corp.* § 679*b*. See chapter XVI, § 329.

<sup>22</sup> *McCall v. Byram Mfg. Co.*, 6 Conn. 428.

<sup>23</sup> *Arms v. Conant*, 36 Vt. 744.

<sup>24</sup> 3 *Clark & M. Corp.* § 679*b*.

might be sanctioned by the board of directors through a resolution passed outside of the state.

§ 171. The author is inclined to believe that the decisions support the proposition that ministerial acts performed by the directors at meetings held outside the state are valid, even though there is no charter provision expressly allowing this,<sup>25</sup> although there is authority to the contrary.<sup>26</sup>

### § 172. Action of Directors Not Assembled in Meeting.

The corporation law of West Virginia, as well as that of Nevada, and possibly other states, prescribes that the action of a majority of the board of directors, although not at a regularly called meeting, if assented to in writing by all of the other members of the board, shall always be as valid and effective in all respects as if passed by the board in regular meeting assembled.<sup>27</sup> This gives legislative sanction to a practice sometimes indulged in, but which, without some specific authority for it, is illegal.<sup>28</sup> The reason why the directors are required to meet and confer is that they are acting as trustees for the interests of the stockholding body at large. They are constituted a board in order that they may deliberate, and

<sup>25</sup> *Bellows v. Todd*, 39 Iowa, 209; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128; *Missouri Lead Mining & Smelting Co. v. Reinhard*, 114 Mo. 218, 21 S. W. 488, 35 Am. St. Rep. 746.

<sup>26</sup> *Ormsby v. Vermont Copper Mining Co.*, 56 N. Y. 623.

<sup>27</sup> Code W. Va. 1899, c. 53, § 51, as amended by Acts 1901, c. 35, § 16 (Code 1906, c. 53, § 51); *General Corporation Law Nev.* (Laws 1903, c. 88) §§ 23, 111; *State v. Smith*, 48 Vt. 266.

<sup>28</sup> *Kansas City Hay Press Co. v. Devo*l (C. C.) 72 Fed. 717; *Herrington v. District Tp. of Liston*, 47 Iowa, 11; *New Orleans Bldg. Co. v. Lawson*, 11 La. 34; *Ross v. Crockett*, 14 La. Ann. 811; *Corn Exchange Bank v. Cumberland Coal Co.*, 14 N. Y. Super. Ct. Rep. (1 Bosw.) 436; *Constant v. Rector, etc., of St. Albans Church*, 4 Daly (N. Y.) 305; *First Nat. Bank of Springfield v. Asheville Furniture & Lumber Co.*, 116 N. C. 827, 21 S. E. 948; 3 *Clark & M. Corp.* § 677; 10 *Cyc.* 774, 775.

each director have the benefit of the views pro and con of every other director. When acting outside of a meeting this interchange of views cannot usually be had, and the interests of the stockholders are to that extent prejudiced. Nevertheless it has been found very desirable in many cases where a quorum of the board cannot be obtained because of absence of certain members, or for other causes, and where the matter to be authorized is one so clearly expedient as to leave little doubt of its wisdom, to have the power to take the action of the board by obtaining the individual assent of the various members in writing. Should such a provision be inserted in the charter of a corporation, it is not conceived that any one could take exception to this method of procedure. Certainly no stockholder who purchased stock with the full knowledge that the practice had been sanctioned could be heard to complain, and no one else would be in a position to criticise this mode of action.<sup>29</sup> In many recent charters, therefore, such a clause has been inserted.

### § 173. Directors Making and Amending By-Laws.

By-laws are usually adopted and amended by the stockholders in meeting assembled. They are enacted to define and limit the powers of directors and officers. It is contrary to the general practice to confer the right to make and amend by-laws upon the directors.<sup>30</sup> There is no reason, however, why this may not be done, if the incorporators or stockholders see fit to do so.<sup>31</sup> In fact, the statutes in some jurisdictions confer this power upon the directors alone, as in the District of Columbia;<sup>32</sup> and in other jurisdictions, as in New Jersey<sup>33</sup>

<sup>29</sup> 3 Clark & M. Corp. § 677; *supra*, note 1; *infra*, chapter XV, § 323.

<sup>30</sup> 3 Clark & M. Corp. § 641; 10 Cyc. 353; 1 Cook, Corp. § 4*a*. See *infra*, chapter XIII, § 275.

<sup>31</sup> *Id.*; 10 Cyc. 354.

<sup>32</sup> Code of Law D. C. 1901, § 612.

<sup>33</sup> General Corporation Law N. J. (2 Comp. St. 1910, p. 1606) § 11.

and Delaware,<sup>34</sup> the directors may be given this power, if so specified in the charter. In states where it is not contrary to the policy of the law to vest a right of this magnitude in the directors, it may be thought desirable to insert such provisions in the certificate of incorporation. It is a power which is apt to be dangerous to the rights of the minority stockholders.

#### § 174. Directors Disposing of Entire Property.

At common law, if the board of directors should desire to divert the entire property of a perfectly solvent company from the business for which it was organized, or to dispose of it, a minority of the stockholders might prevent this.<sup>35</sup> Therefore, where it is desired to lodge a greater degree of power in the directors than would otherwise exist, it is customary in the charter to specify these powers, and among them the right to dispose of the entire property of the company upon the conditions and in the manner specifically appearing in the certificate of incorporation. The charter being considered in the light of a contract between the stockholders,<sup>36</sup> such a provision would place the minority in a position from which it would be very difficult to successfully assail the action of the directors in so disposing of the assets.

#### § 175. To Create Voting Trusts.

The legality of voting trusts will be discussed in another portion of this work.<sup>37</sup> From the tenor of certain judicial utterances, it is believed that a voting trust which might otherwise be declared illegal would be sustained if the charter con-

<sup>34</sup> General Corporation Law Del. (22 Del. Laws, p. 260) § 12.

<sup>35</sup> See *Chicago City R. Co. v. Allerton*, 18 Wall. (U. S.) 233, 21 L. Ed. 902.

<sup>36</sup> *Supra*, § 154.

<sup>37</sup> See chapter XXIII.

tains a provision authorizing it.<sup>38</sup> In some states voting trusts are made legal by statute, whether referred to in the charter or not,<sup>39</sup> and in still others they have been sustained by the courts without aid either from the statute or charter.<sup>40</sup>

### § 176. To Cumulate Votes.

In some states, as in New York<sup>41</sup> and New Jersey,<sup>42</sup> the law requires the provision permitting cumulative voting to be inserted in the charter, if this right is to be exercised.

### § 177. Power to Regulate Inspection of Records.

By the common law the stockholders of a corporation have a right to examine at reasonable times the books and records of the company.<sup>43</sup> It has been held that they need not assign any reason making such examination necessary,<sup>44</sup> though there

<sup>38</sup> *Bowditch v. Jackson Co.*, 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913A, 366; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Elger v. Boyle*, 126 N. Y. Supp. 946, 69 Misc. Rep. 273.

<sup>39</sup> New York Incorporation Law (Laws 1901, c. 355); Maryland Corporation Act (Laws 1908, c. 240) § 77.

<sup>40</sup> See chapter XXIII.

<sup>41</sup> New York General Corporation Law (Consol. Laws 1909, c. 23) §§ 20, 24.

<sup>42</sup> P. L. N. J. 1900, p. 418. See *infra*, chapter XIII, § 281.

<sup>43</sup> *Ranger v. Champion Cotton Press Co.* (C. C.) 51 Fed. 61; *Foster v. White*, 86 Ala. 467, 6 South. 88; *Stone v. Kellogg*, 62 Ill. App. 444; *Mathews v. McClaghry*, 83 Ill. App. 224; *Cockburn v. Union Bank of Louisiana*, 13 La. Ann. 289; *Weihenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446; *State ex rel. Wilson v. St. Louis & S. F. Ry. Co.*, 29 Mo. App. 301; *People v. Mott*, 1 How. Prac. (N. Y.) 247; *Commonwealth v. Philadelphia & R. R. Co.* (Com. Pl.) 3 Pa. Dist. R. 115; *State ex rel. Weinberg v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208; 2 Clark & M. Corp. §§ 530, 531; 2 Cook, Corp. § 511; 10 Cyc. 954.

<sup>44</sup> *Foster v. White*, 86 Ala. 467, 6 South. 88; *State ex rel. Wilson v. St. Louis & S. F. Ry. Co.*, 29 Mo. App. 301; *State ex rel. Spinney*

are decisions to the effect that the applicant should show that he is not seeking personal or speculative ends.<sup>45</sup> When making such examination, a stockholder is entitled to have his attorney or a stenographer, or any other proper agent, accompany him, or act for him,<sup>46</sup> and he is allowed to take copies.<sup>47</sup> The right to inspect is often availed of by persons interested in a rival business, who, merely for the purpose of ascertaining the trade secrets of a competitor, have purchased a few shares of stock in such competing company.<sup>48</sup> To remedy this mischief, charters are frequently drawn with a clause empowering the directors to determine from time to time the conditions under which such inspection will be permitted, and forbidding the examination of the books by any stockholder except in compliance with these rules.<sup>49</sup> Such a provision has, however, been declared illegal in Delaware.<sup>50</sup>

*v. Sportsman's Park & Club Ass'n*, 29 Mo. App. 326; *People v. Paton*, 5 N. Y. St. Rep. 313; *In re Reiss*, 62 N. Y. Supp. 145, 30 Misc. Rep. 234; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707.

<sup>45</sup> *State ex rel. O'Hara v. National Biscuit Co.*, 69 N. J. Law. 198, 54 Atl. 241; *People v. Northern Pac. R. Co.*, 50 N. Y. Super. Ct. (18 Jones & S.) 456; *Phoenix Iron Co. v. Commonwealth*, 113 Pa. 563, 6 Atl. 75.

<sup>46</sup> *Ellsworth v. Dorwart*, 95 Iowa, 108, 63 N. W. 588, 58 Am. St. Rep. 427; *State ex rel. Martin v. Bienville Oil Works Co.*, 28 La. Ann. 204; *Mitchell v. Rubber Reclaiming Co.* (N. J. Ch.) 24 Atl. 407; *People ex rel. Clason v. Nassau Ferry Co.*, 86 Hun, 128, 33 N. Y. Supp. 244.

<sup>47</sup> *Martin v. W. J. Johnston Co.*, 62 Hun, 557, 17 N. Y. Supp. 133; *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 48 L. R. A. 732, 78 Am. St. Rep. 707.

<sup>48</sup> *Cobb v. Lagarde*, 129 Ala. 488, 30 South. 326; *Heminway v. Heminway*, 58 Conn. 443, 19 Atl. 766; *Weihenmayer v. Bitner*, 88 Md. 325, 42 Atl. 245, 45 L. R. A. 446; *State ex rel. O'Hara v. Biscuit Co.*, 69 N. J. Law, 198, 54 Atl. 241.

<sup>49</sup> *Ranger v. Champion Cotton Press Co.* (C. C.) 51 Fed. 61.

<sup>50</sup> *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 1 Boyce (Del.) 379, 77 Atl. 16, 30 L. R. A. (N. S.) 290.

§ 178. **Executive Committee.**

In large corporations, having a great number of directors, it has been found convenient to delegate all the powers of the board to an executive committee, which shall, between the meetings of the board, exercise all the powers of the latter. This device is of frequent occurrence when it is sought to place the control of large corporate interests in the hands of a small coterie of interested persons. In the absence of a statute, charter provisions, or general governing custom authorizing it, it has been held that there is no warrant for the delegation by the directors of any of their discretionary powers to an executive committee.<sup>51</sup> Merely ministerial powers can be so delegated.<sup>52</sup> If, however, the certificate of incorporation contains a clause authorizing an executive committee and defining its powers, it appears to be legal, even to the extent of discretionary acts.<sup>53</sup>

§ 179. **Capital Stock.**

The capital stock must, of course, be limited to such an amount as is warranted by law. The charter should show the amount, the number of shares into which it is to be divided, and the par value of each share,<sup>54</sup> although in certain portions of the United States the exact amount of capital stock need not be specified in the charter.<sup>55</sup>

§ 180. The different classes of stock which are to be issued, and the amounts of each class, respectively, should be

<sup>51</sup> See, on this subject, 2 Cook, Corp. § 715; 10 Cyc. 772.

<sup>52</sup> See *Metropolitan Telephone & Telegraph Co. v. Domestic Telegraph & Telephone Co.*, 44 N. J. Eq. 568, 14 Atl. 907; 2 Cook, Corp. § 715; 10 Cyc. 772.

<sup>53</sup> Id.

<sup>54</sup> *State ex rel. Howe v. Shelbyville, etc., Turnpike Co.*, 41 Ind. 151.

<sup>55</sup> 1 Cook, Corp. § 182.

stated in the certificate of incorporation. There is no necessity for a special statute conferring the right, upon the incorporation of a company, to create preferred stock.<sup>56</sup> Where such stock is authorized, the preferences should plainly appear upon the face of the charter; the character of the preferences, both as to dividends and on the dissolution of the company, being explicitly stated. The nature of preferences, and manner of stating them, will be treated in a subsequent chapter of this work.<sup>57</sup> Where the dividends on preferred stock are limited by statute to a certain amount, this amount should, of course, not be exceeded.

### § 181. Number of Shares Subscribed.

In certain states where the liability of stockholders is limited to the amount unpaid on the original *subscription*, and no particular amount of stock is required to be subscribed as a condition precedent to obtaining the charter or to engaging in business, it is customary to have each incorporator subscribe for one share only, upon the theory that he can afterwards purchase as much more stock as he pleases, but that there will be no liability beyond the amount unpaid on the one share for which subscription was originally made. Whether such an arrangement, made for the purpose of avoiding liability on stock subsequently acquired by the subscribers, would be upheld by the courts, is doubtful.<sup>58</sup>

### § 182. Names and Residences of Incorporators.

There is a distinction between statutes which require the names and *residences* of incorporators to be stated in the cer-

<sup>56</sup> Kent v. Quicksilver Mining Co., 78 N. Y. 167; 1 Cook, Corp. § 268.

<sup>57</sup> Chapter XVIII, §§ 374-380.

<sup>58</sup> Seaboard Nat. Bank v. Slater (C. C.) 117 Fed. 1002; Tuthill Spring Co. v. Smith, 90 Iowa, 331, 57 N. W. 853; Christensen v.

tificate of incorporation, and those which require merely the names and *post office addresses* of the incorporators to be so set forth. Where the latter only are required, the post office address may be given in the care of any person far removed from the domicile, and there need be nothing to advise the tax authorities of the actual place of residence of any interest the various incorporators may have in the company.<sup>59</sup> Where a statute requires that a given per cent. of the incorporators shall be residents of the state, the courts sometimes insist that the residences of all the incorporators should be stated, and that the certificate should not confine itself to a statement that a given per cent. of signers is composed of residents.

### § 183. Duration.

Generally the duration of the company must be stated in the charter. This is particularly true in those states where the corporate life may be either unlimited or restricted to a term of years. Care should be taken not to state the length of its life as being beyond the period authorized, although, if such a mistake should be made, the corporation would be held to have a valid existence for the maximum period permitted under the law.<sup>60</sup>

§ 184. Where a corporation can be made of unlimited duration, it is generally better to state its corporate life as perpetual. This will avoid the necessity of renewing the charter at the expiration of the time which would be otherwise limited in the certificate.

Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429; Bush v. Cartwright, 7 Or. 329; Walker v. Lewis, 49 Tex. 123; Hamilton v. Glenn, 85 Va. 901, 9 S. E. 129.

<sup>59</sup> Dill, N. J. Corp. p. 23.

<sup>60</sup> People v. Cheeseman, 7 Colo. 376, 3 Pac. 716; Scanlan v. Crawshaw, 5 Mo. App. 337.

## § 185. Additional Powers.

The New Jersey law allows a certificate of incorporation to contain "any provision which the incorporators may choose to insert for the regulation of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors and the stockholders or any class or classes of stockholders," provided such provision be not contrary to the laws of the state.<sup>61</sup> The same provision is found in Delaware,<sup>62</sup> West Virginia,<sup>63</sup> and Virginia.<sup>64</sup> The statute in New York is quite similar; but, instead of allowing the incorporators to "create" powers, it allows them to "limit" the powers of the directors and to regulate the business and conduct of the affairs of the corporation.<sup>65</sup> Under the broad character of the statutes in the four states first named, it has been held that the provisions in the certificate of incorporation take the place of and possess the qualities of a special charter granted by the Legislature and form a contract between the company and the stockholders.<sup>66</sup> Where a charter may contain stipulations of this kind, there is presented great opportunity for the display of skill by counsel in so drafting the instrument as to provide for many exigencies which, by reason of the special provisions inserted in the charter, would be governed by principles different from those prevailing under the common law.

<sup>61</sup> New Jersey Corporation Act (P. L. 1896, p. 280) § 8, as amended by P. L. 1898, p. 407.

<sup>62</sup> General Corporation Law Del. (22 Del. Laws, p. 258) § 5, subsec. 8. See chapter XVIII, § 380.

<sup>63</sup> Code W. Va. 1906, c. 54, § 6.

<sup>64</sup> Virginia Corporation Act (Laws 1902-04, c. 270, subc. 1) § 2, as amended by Laws 1910, c. 35.

<sup>65</sup> General Corporation Law N. Y. (Consol. Laws 1909, c. 23) § 10, subsec. 2. See chapter XVIII, § 390.

<sup>66</sup> *Ellerman v. Chicago Junction Rys. & Union Stockyards Co.*, 49 N. J. Eq. 217, 23 Atl. 287; *Brown v. Morton*, 71 N. J. Law, 26, 58 Atl. 95.

The trend of modern thought is against permitting incorporators to "create" new powers not conferred by the statute, and is tending to restrict them within the limits laid down in the New York law.

### § 186. Advantage of Inserting Features in Charter Rather Than in By-Laws.

Some of the features to which attention has been called above may be contained either in the by-laws or in the charter. Great differences in practical result may depend upon whether these matters are inserted in the charter or the by-laws. It is usually much more difficult to amend a charter than to change a by-law. A charter provision inserted for the benefit of minority stockholders affords much more adequate protection to them, therefore, than the self-same provision appearing in the by-laws merely.<sup>67</sup>

### § 187. Signatures.

After the certificate of incorporation has been properly drawn, it must,<sup>68</sup> of course, be signed by the statutory number of persons. Where the law requires all directors to be stockholders, and that the directors for the first year shall be named in the certificate, and does not require any reference to the amount subscribed by each incorporator, it is safer to have each director sign as an incorporator, although the number of signers may be more than the minimum number of incorporators specified in the statute.<sup>69</sup> The reason for this is that the certificate then shows on its face, *prima facie*, that the directors named are interested financially in the company. A better

<sup>67</sup> *Scanlan v. Snow*, 2 App. D. C. 137; *Day v. Mill Owners' Mut. Fire Ins. Co.*, 75 Iowa, 694, 38 N. W. 113; *Schrick v. St. Louis Mut. House Building Co.*, 34 Mo. 423; *Loewenthal v. Rubber Reclaiming Co.*, 52 N. J. Eq. 440, 28 Atl. 454. See chapters XIV, XXIV.

<sup>68</sup> *State v. Critchett*, 37 Minn. 13, 32 N. W. 787.

<sup>69</sup> *Dancy v. Clark*, 24 App. D. C. 487.

way still, however, is to have the amount subscribed by each incorporator inserted in the certificate, although not required by statute.<sup>70</sup> Sometimes, though, practical objections to doing this may exist.

### § 188. Acknowledgment.

The acknowledgments of the incorporators should be taken before an officer authorized by the law of the parent state to take such acknowledgments, and should be in the form required by the laws of that state.<sup>71</sup> It is generally required, where the acknowledgment is taken outside the limits of that state, that the notary's official signature and seal should be authenticated by the clerk of the court of the county where the acknowledgment is taken; but this is not universal.

### § 189. Filing Certificate.

The last act to be performed by the incorporators is the filing of the certificate in the proper office. In those states whose laws make it incumbent upon a judge to examine the incorporation agreement and to approve it before filing, this approval must, of course, be had. In other states, where there is no such provision, the officer whose duty it is to receive such a document for record has usually merely a ministerial duty to perform, without discretion or right to pass upon the form of the document; and the incorporators must take their chances as to its being upheld in the courts, should it ever be brought into question. But, though such a ministerial officer may not have the *right* to pass upon it, at the same time, if he exercises that power, and declines to receive a paper of this kind

<sup>70</sup> Echo Park Protective Ass'n, 5 Pa. Co. Ct. R. 383.

<sup>71</sup> Kaiser v. Lawrence Savings Bank, 56 Iowa, 104, 8 N. W. 772, 41 Am. Rep. 85; Doyle v. Mizner, 42 Mich. 332, 3 N. W. 968; First Baptist Soc. v. Rapalee, 16 Wend. (N. Y.) 605; Greenbrier Industrial Exposition v. Rodes, 37 W. Va. 738, 17 S. E. 305.

for record, on the ground that it does not conform to the law, the courts may decline to interfere by mandamus to compel him to do so, where they are convinced that it does not comply with the statutory provisions.<sup>72</sup>

### § 190. Form of Charter.

Rather than attempt to submit to the reader a form of charter, which, by filling in certain blanks, he may adapt to his own purposes, it has seemed to the author better to insert a certificate of incorporation prepared by most eminent counsel for one of the largest corporations ever organized under the laws of the state of New Jersey. This can easily be modified to meet the needs of any corporation. In order, however, that there may be some guide to those who desire to organize a corporation having different objects in view, and who wish to confer other powers than those permitted by the charter referred to, additional object clauses are appended to this chapter, as well as certain clauses regulating the methods of doing business somewhat differently than are found in the model given.

### § 191. Amended Certificate of Incorporation of United States Steel Corporation.

We, the undersigned, in order to form a corporation for the purposes hereinafter stated, under and pursuant to the provisions of the act of the Legislature of the state of New Jersey, entitled "An act concerning corporations (Revision of 1896)," and the acts amendatory thereof and supplemental thereto, do hereby certify as follows:

I. The name of the corporation is "United States Steel Corporation."

II. The location of its principal office in the state of New Jersey is at No. 51 Newark street, in the city of Hoboken, county of Hudson. The name of the agent therein and in charge thereof, upon whom process against the corporation may be served, is Hudson Trust Company. Said office is to be the registered office of said corporation.

<sup>72</sup> Dancy v. Clark, 24 App. D. C. 487.

**III. The objects for which the corporation is formed are:**

To manufacture iron, steel, manganese, coke, copper, lumber and other materials, and all or any articles consisting, or partly consisting, of iron, steel, copper, wood or other materials, and all or any products thereof.

To acquire, own, lease, occupy, use or develop any lands containing coal or iron, manganese, stone or other ores, or oil, and any wood lands, or other lands for any purpose of the company.

To mine, or otherwise to extract or remove coal, ores, stone and other minerals and timber from any lands owned, acquired, leased or occupied by the company, or from any other lands.

To buy and sell, or otherwise to deal or to traffic in, iron, steel, manganese, copper, stone, ores, coal, coke, wood, lumber and other materials, and any of the products thereof, and any articles consisting, or partly consisting thereof.

To construct bridges, buildings, machinery, ships, boats, engines, cars and other equipment, railroads, docks, slips, elevators, water works, gas works and electric works, viaducts, aqueducts, canals and other waterways, and any other means of transportation, and to sell the same, or otherwise to dispose thereof, or to maintain and operate the same, except that the company shall not maintain or operate any railroad or canal in the state of New Jersey.

To apply for, obtain, register, purchase, lease, or otherwise to acquire, and to hold, use, own, operate and introduce, and to sell, assign, or otherwise to dispose of, any trade marks, trade names, patents, inventions, improvements and processes used in connection with, or secured under letters patent of the United States, or elsewhere, or otherwise; and to use, exercise, develop, grant licenses in respect of, or otherwise to turn to account any such trade-marks, patents, licenses, processes, and the like, or any such property or rights.

To engage in any other manufacturing, mining, construction or transportation business of any kind or character whatsoever, and to that end to acquire, hold, own and dispose of any and all property, assets, stocks, bonds and rights of any and every kind; but not to engage in any business hereunder which shall require the exercise of the right of eminent domain within the state of New Jersey.

To acquire by purchase, subscription or otherwise, and to hold or to dispose of, stocks, bonds or any other obligations of any corporation formed for or then or theretofore engaged in or pursuing, any one or more of the kinds of business, purposes, objects or operations above indicated, or owning or holding any property of any kind herein mentioned; or of any corporation owning or holding the stocks or the obligations of any such corporation.

To hold for investment, or otherwise to use, sell or dispose of, any

stock, bonds or other obligations of any such other corporation; to aid in any manner any corporation whose stock, bonds or other obligations are held or are in any manner guaranteed by the company, and to do any other acts or things for the preservation, protection, improvement or enhancement of the value of any such stock, bonds or other obligations, or to do any acts or things designed for any such purpose; and, while owner of any such stock, bonds or other obligations, to exercise all the rights, powers and privileges of ownership thereof, and to exercise any and all voting power thereon.

The business or purpose of the company is from time to time to do any one or more of the acts and things herein set forth; and it may conduct its business in other states and in the territories and foreign countries, and may have one office or more than one office, and keep the books of the company outside of the state of New Jersey, except as otherwise may be provided by law; and may hold, purchase, mortgage and convey real and personal property either in or out of the state of New Jersey.

Without in any particular limiting any of the objects and powers of the corporation, it is hereby expressly declared and provided that the corporation shall have power to issue bonds and other obligations, in payment for property purchased or acquired by it, or for any other object in or about its business; to mortgage or pledge any stocks, bonds or other obligations, or any property which may be acquired by it, to secure any bonds or other obligations by it issued or incurred; to guarantee any dividends or bonds or contracts or other obligations; to make and perform contracts of any kind and description; and in carrying on its business, or for the purpose of attaining or furthering any of its objects, to do any and all other acts and things, and to exercise any and all other powers which a copartnership or natural person could do and exercise, and which now or hereafter may be authorized by law.

IV. The total authorized capital stock of the corporation is eleven hundred million dollars (\$1,100,000,000), divided into eleven million shares of the par value of one hundred dollars each. Of such total authorized capital stock, five million five hundred thousand shares, amounting to five hundred and fifty million dollars, shall be preferred stock, and five million five hundred thousand shares, amounting to five hundred and fifty million dollars, shall be common stock.

From time to time, the preferred stock and the common stock may be increased according to law, and may be issued in such amounts and proportions as shall be determined by the board of directors, and as may be permitted by law.

The holders of the preferred stock shall be entitled to receive when and as declared, from the surplus or net profits of the corporation,

yearly dividends at the rate of seven per centum per annum, and no more, payable quarterly on dates to be fixed by the by-laws. The dividends on the preferred stock shall be cumulative, and shall be payable before any dividend on the common stock shall be paid or set apart: so that, if any year dividends amounting to seven per cent. shall not have been paid thereon, the deficiency shall be payable before any dividends shall be paid upon or set apart for the common stock.

Whenever all cumulative dividends on the preferred stock for all previous years shall have been declared and shall have become payable, and the accrued quarterly installments for the current year shall have been declared, and the company shall have paid such cumulative dividends for previous years and such accrued quarterly installments, or shall have set aside from its surplus or net profits a sum sufficient for the payment thereof, the board of directors may declare dividends on the common stock, payable then or thereafter, out of any remaining surplus or net profits.

In the event of any liquidation or dissolution or winding up (whether voluntary or involuntary) of the corporation, the holders of the preferred stock shall be entitled to be paid in full both the par amount of their shares, and the unpaid dividends accrued thereon before any amount shall be paid to the holders of the common stock; and after the payment to the holders of the preferred stock of its par value, and the unpaid accrued dividends thereon, the remaining assets and funds shall be divided and paid to the holders of the common stock according to their respective shares.

V. The names and post-office addresses of the incorporators, and the number of shares of stock for which severally and respectively we do hereby subscribe (the aggregate of our said subscriptions, being three thousand dollars, is the amount of capital stock with which the corporation will commence business), are as follows:

Name.	Post Office Address.	Number of Shares.	
		Preferred Stock.	Common Stock.
Charles C. Cluff.....	51 Newark Street, Hoboken, New Jersey.....	5	5
William J. Curtis.....	Ditto. ....	5	5
Charles MacVeagh.....	Ditto. ....	5	5

VI. The duration of the corporation shall be perpetual.

VII. The number of directors of the company shall be fixed from time to time by the by-laws; but the number if fixed at more than three, shall be some multiple of three. The directors shall be classified with respect to the time for which they shall severally hold office by dividing them into three classes, each consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class for a term of two years; and the directors of the third class for a term of three years; and at each annual election the successors to the class of directors whose terms shall expire in that year shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

The number of the directors may be increased as may be provided in the by-laws. In case of any increase of the number of the directors the additional directors shall be elected as may be provided in the by-laws, by the directors or by the stockholders at an annual or special meeting, and one-third of their number shall be elected for the then unexpired portion of the term of the directors of the first class, one-third of their number for the unexpired portion of the term of the directors of the second class, and one-third of their number for the unexpired portion of the term of the directors of the third class, so that each class of directors shall be increased equally.

In case of any vacancy in any class of directors through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority of the board of directors, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of a successor.

The board of directors shall have power to hold their meetings outside of the state of New Jersey at such places as from time to time may be designated by the by-laws or by resolution of the board. The by-laws may prescribe the number of directors necessary to constitute a quorum of the board of directors, which number may be less than a majority of the whole number of the directors.

Unless authorized by votes given in person or by proxy by stockholders holding at least two-thirds of the capital stock of the corporation, which is represented and voted upon in person or by proxy at a meeting specially called for that purpose or at an annual meeting, the board of directors shall not mortgage or pledge any of its real property, or any shares of the capital stock of any other corporation; but this prohibition shall not be construed to apply to the execution of any purchase-money mortgage or any other purchase-money lien. As authorized by the act of the Legislature of the state

of New Jersey passed March 22, 1901 (P. L. 260), amending the 17th section of the act concerning corporations (Revision of 1896), any action which theretofore required the consent of the holders of two-thirds of the stock at any meeting after notice to them given, or required their consent in writing to be filed, may be taken upon the consent of, and the consent given and filed by the holders of two-thirds of the stock of each class represented at such meeting in person or by proxy.

Any officer elected or appointed by the board of directors may be removed at any time by the affirmative vote of a majority of the whole board of directors. Any other officer or employé of the Company may be removed at any time by vote of the board of directors, or by any committee or superior officer upon whom such power of removal may be conferred by the by-laws or by vote of the board of directors.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint from the directors an executive committee, of which a majority shall constitute a quorum; and to such extent as shall be provided in the by-laws, such committee shall have and may exercise all or any of the powers of the board of directors, including power to cause the seal of the corporation to be affixed to all papers that may require it.

The board of directors, by the affirmative vote of a majority of the whole board, may appoint any other standing committees, and such standing committees shall have and may exercise such powers as shall be conferred or authorized by the by-laws.

The board of directors may appoint not only other officers of the company, but also one or more vice-presidents, one or more assistant treasurers and one or more assistant secretaries; and, to the extent provided in the by-laws, the persons so appointed respectively shall have and may exercise all the powers of the president, of the treasurer and of the secretary, respectively.

The board of directors shall have power from time to time to fix and to determine and to vary the amount of the working capital of the company; and to direct and determine the use and disposition of any surplus or net profits over and above the capital stock paid in; and in its discretion the board of directors may use and apply any such surplus or accumulated profits in purchasing or acquiring its bonds or other obligations, or shares of its own capital stock, to such extent and in such manner and upon such terms as the board of directors shall deem expedient; but shares of such capital stock so purchased or acquired may be resold, unless such shares shall have been retired for the purpose of decreasing the company's capital stock as provided by law.

The board of directors from time to time shall determine whether and to what extent, and at what times and places, and under what conditions and regulations, the accounts and books of the corporation, or any of them, shall be open to the inspection of the stockholders, and no stockholder shall have any right to inspect any account or book or document of the corporation, except as conferred by statute or authorized by the board of directors, or by a resolution of the stockholders.

Subject always to by-laws made by the stockholders, the board of directors may make by-laws, and, from time to time, may alter, amend or repeal any by-laws; but any by-laws made by the board of directors may be altered or repealed by the stockholders at any annual meeting, or at any special meeting, provided notice of such proposed alteration or repeal be included in the notice of the meeting.

In witness whereof, we have hereunto set our hands and seals the 23rd day of February, 1901.

Charles C. Cluff. [L. S.]

William J. Curtis. [L. S.]

Charles MacVeagh. [L. S.]

Signed, sealed and delivered in the presence of

Francis Lynde Stetson.

Victor Morawetz.

State of New Jersey, }  
County of Hudson, } ss.:

Be it remembered that on this 23rd day of February, 1901, before the undersigned, personally appeared Charles C. Cluff, William J. Curtis and Charles MacVeagh, who, I am satisfied, are the persons named in and who executed the foregoing certificate; and I having first made known to them and to each of them, the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed.

Geo. Holmes,

Master in Chancery of New Jersey.

[10ct. Internal Revenue Stamp Cancelled.]

Indorsed: "Received in the Hudson Co. N. J. Clerk's Office Feb'y 25th A. D. 1901 and Recorded in Clerk's Record No. — on Page —. Maurice J. Stack, Clerk."

Indorsed: "Filed Feb. 25, 1901. George Wurts, Secretary of State."

Indorsed: "Filed April 1, 1901. George Wurts, Secretary of State."

## § 192. Forms of Object Clauses.

By permission of Hon. James B. Dill, some of the following forms which are found in his valuable treatise on New Jersey Corporations are inserted in this publication. All copy-

rights in said forms are reserved by Judge Dill. Some of the forms which are here inserted have been compiled by the author and have been found to work well in practice.

### § 193. Mercantile Business.

To establish and carry on all or any part of the business of manufacturing, importing, exporting, buying and selling, either as wholesale or retail merchants or both, any or all of the following classes of merchandise, to wit: Dry goods, notions, boots and shoes, hats, and wearing apparel generally, linen and cotton goods, silks, furs, laces, and generally and without limitation all articles of merchandise usually sold or which may conveniently be sold in connection with any of the merchandise hereinabove referred to.

### § 194. Department Store.

To establish and conduct a department store, with any and all branches usually incident thereto, and to this end:

(1) To carry on, both wholesale and retail, the whole or any portion of the businesses of manufacturing, importing, exporting, and buying and selling generally, dry goods, furs, haberdasherie, hosiery and textile fabrics of all kinds; millinery, garments, and wearing apparel generally; linens, laces, feathers, leather goods, furniture, iron ware, china and glass ware, crockery, and other household fittings and utensils, bric-a-brac and ornaments generally; stationery, notions, and fancy goods; hardware, jewelry, gold and silver and plated ware, watches, and precious stones; meats and provisions generally; drugs, chemicals, perfumery, soap, and toilet articles generally; books, papers, magazines, musical instruments, bicycles, and tricycles, boats, motor vehicles of all kinds, coaches, carriages, saddlery and harness, and sporting goods; coal and wood; also wines, liquors, mineral, aerated and other waters, cigars and tobacco and refreshments generally, as well as produce of any and all kinds; milk, cream, butter, eggs and cheese, and dairymen's products generally; flowers, birds, and domestic animals; photographs and photographers' supplies generally; and, without limitation, all natural products, and all manufactured goods and materials; as well as all other things which are usually or which may be properly dealt with in a department store.

(2) To alter, repair, exchange, store, transport, hire, or lease any of the articles or things hereinabove mentioned; and to make and carry out contracts with reference thereto; and to print such ad-

vertising and other literature as may properly be used as an adjunct to a department store.

(3) To establish and conduct cafés, soda fountains, reading and writing rooms, retiring rooms, lounging rooms, dressing rooms, telephones, and other conveniences for the use of customers and others.

(4) To permit other persons or corporations to carry on any kind of business on the premises of this corporation on such terms as to it may seem expedient and proper.

### § 195. Contracting Company.

To establish and conduct the business of contracting and construction in all of its branches, and to this end to execute, deliver, accept and carry out contracts for building, fitting up, reconstructing, altering, improving, decorating, furnishing and removing all kinds of buildings and structures; contracts for earthwork generally above and below ground, for water works and courses, hydraulic works, and for the building of piers, wharves and docks; for draining and reclaiming lands either totally or partially covered by water, and all other contracts of whatsoever kind which are usually or which may properly be incident to the business aforesaid; and for the more effectual prosecution of such business, the said corporation shall have power to borrow and advance money, acquire and dispose of real and personal property, to cultivate crops and to use or sell the same, and to do all other acts necessary or proper to the convenient conduct of the business aforesaid.

### § 196. Mining Company.

To enter, acquire, own, or lease mines, mineral lands, and mining claims of any and every kind, and any interest in or concerning same, and to prosecute, work, and develop the same, either for itself, or for other persons or corporations, upon such terms and for such remuneration as it shall deem fit or proper; and in connection with the working of such mines, and the products of ores and minerals therefrom, to reduce all such ores and minerals to profitable merchantable value, and to sell, exchange, or otherwise dispose of the same; and in connection therewith to contract for, build, buy, or otherwise acquire, own, operate, and dispose of, all necessary buildings, mill sites, water rights, mills, smelters, machinery, roads, railroads, tramways, terminal facilities, ditches, flumes, and such other property as may be necessary and proper to its corporate objects; and to acquire, own, control, or dispose of stock of other corporations; and to engage in trade of every kind as well as in transporta-

tion; and to do everything else that may be directly or indirectly conducive to any of the objects of the company; as well as to contribute to, subsidize, or otherwise aid or take part in any such operations.

### § 197. Apartment House Company.

To acquire by purchase, gift, lease, exchange, or otherwise, real and personal property or either, or any interest or estate therein, and any rights over or connected therewith; and to lease, sell, or otherwise part with or incumber the same; to turn the same to account as may seem expedient; and in particular to prepare building sites, and to construct, reconstruct, alter, improve, decorate, furnish, and maintain buildings for hotel purposes, dwelling and apartment houses, and other structures for the accommodation of the public and of individuals; to occupy, manage, conduct, and carry on hotels, apartment houses, dwelling houses, restaurants, and places for accommodation of the public and of individuals, whether such buildings or places belong to this corporation or not; and to collect rents and incomes, and to supply to tenants and others attendance, messengers, light, heat and power, and all other conveniences and advantages; and, in connection with the objects hereinabove enumerated, to establish and conduct, and permit the establishment and operation of, any business which may be conveniently carried on, and the establishment of which may be directly or indirectly conducive to any of the objects of the corporation; as well as to contribute to, subsidize, or otherwise aid or take part in any such operations.

### § 198. Automobiles.

The purchase, manufacture, and sale of various kinds of motors, engines, machines, or other machinery or contrivances for the generation of steam, electric, gasoline, or other forms of power now known or which may hereafter be discovered; the purchase, manufacture, and sale of cars, carriages, wagons, boats, and vehicles of every kind and description, for the transportation of passengers or goods, whether the same shall be propelled by motors, engines, machines, or other contrivances operated by means of steam, electricity, gasoline, or other forms of power; the purchase, manufacture, and sale of machinery, machinery supplies, and engineering appliances, whether incidental to the construction of motor vehicles or not.

**§ 199. Food Products.**

To purchase or otherwise acquire, to manufacture, market, prepare for market, sell, deal in, and deal with food products of every class and description, including cereals and cereal products, meats, fish, vegetables, fruit, soups, delicacies, and all canned or preserved goods, and all food and other preparations.

To engage in any business, whether manufacturing or otherwise, which may seem advantageous or useful in connection therewith, and to manufacture, market, or prepare for market any article or thing which the company may use in connection with its business.

In connection with the foregoing to manufacture, market, and prepare for market, buy, sell, deal in, and deal with tin, and any products of tin, glassware, and any article of glassware, or any other article, receptacle, package, or thing which may be useful in connection with the manufacture or marketing of the products of the company.

To protect the products of the company by trade-marks, trade-names, or any distinguishing name or title, and as well to acquire, take over, or otherwise deal in patents or other protection.

**§ 200. Insurance Agents.**

To act as agents or brokers in the business of marine, fire, life, accident, and fidelity insurance, in the business of giving protection to principals and employers, and any and all other kinds of insurance in all its branches.

To act as agents or representatives of owners or other persons or corporations having or claiming to have any interest in merchandise, vessels, cargoes, or other subjects of insurance.

**§ 201. Lumber.**

To acquire, hold, improve, lease, and sell timber, farming, grazing, mineral, and other lands and the products thereof; to build, construct, maintain, and operate plants and works for the development of such lands, and for the handling, preparing, and rendering commercially available of the various products thereof.

To manufacture lumber, iron, steel, manganese, coke, copper, and other materials, and all or any articles consisting, or partly consisting, of wood, iron, steel, copper, or other materials, and all or any products thereof.

To acquire, own, lease, sell, use, or develop any lands containing coal or iron, manganese, stone, or other minerals, or oil, and any woodlands, or other lands for any purpose of the company.

To mine or otherwise to extract or remove coal, ores, stone, and other minerals, and timber from any lands owned, acquired, leased, or occupied by the company, or from any other lands.

To buy or sell, or otherwise to deal or to traffic in, wood, lumber, iron, steel, manganese, copper, stone, ores, coal, coke and other materials and any of the products thereof, and any articles consisting, or partly consisting, thereof.

### § 202. Manufacturing.

To purchase, lease, or otherwise acquire lands and buildings in .....or elsewhere for the erection and establishment of a manufactory or manufactories and workshops, with suitable plant, engines, and machinery, with a view to manufacture, purchase, sell, or otherwise deal in ....., either directly or indirectly, through the medium of agents or otherwise; in particular to acquire the business now carried on by ....., with the land and buildings, plant, stock, and other properties connected with the business, and also the good will of the said business, and the benefit of all pending contracts, and the stock in trade thereof, together with the patents and other rights and privileges relating to said business, vested in or held on behalf of them; to purchase or otherwise acquire patents, patent rights, and privileges, improvements, or secret processes for or in any way relating to all or any of the objects aforesaid, and to grant licenses for the use of, or to sell or otherwise deal with, any patents, patent rights, and privileges, improvements, or secret processes acquired by the company; to sell, lease, or otherwise deal with real and personal property of the company.

### § 203. Newspaper and Publishing.

To acquire, print, publish, conduct, and circulate or otherwise deal with any newspaper or newspapers or other publications, and generally to carry on the business of newspaper proprietors and general publishers; to carry on, if and when it shall seem desirable, the trade or business of general printers, lithographers, engravers, and advertising agents; to build, construct, erect, purchase, hire, or otherwise acquire or provide any buildings, offices, workshops, plant, and machinery, or other things necessary or useful for the purpose of carrying out the objects of the company.

**§ 204. Schools.**

To maintain and operate a school or schools in which students may obtain a classical, mathematical, scientific, technical, or general education.

To provide for the delivery and holding of lectures, exhibitions, public meetings, classes, and conferences, calculated directly or indirectly to advance the cause of education.

**§ 205. Clauses Regulating Business.**

The following general clauses regulating the transaction of certain phases of the corporate business have been found to be well adapted to the needs of the modern corporation. Some of them are taken from the work of Judge Dill on New Jersey Corporations above referred to, with his permission, and with the reservation of his copyright.

**§ 206. Executive Committee.**

There may be an executive committee, composed of such members of the board of directors as may be prescribed by the by-laws, the members of said committee to be designated by said board by resolution passed by a majority thereof, which committee shall have and may exercise all the powers conferred upon the board of directors by law or by the charter or by-laws of this corporation, either between the meetings of the board of directors, or at any meetings of such board when a quorum thereof shall not be present. The executive committee shall have power to elect its own officers, to prescribe regulations for the conduct of its business, and to fix the number necessary to constitute a quorum. The compensation of the members of the executive committee shall be fixed by the stockholders, and their terms of office shall be co-extensive with their terms of office as directors.

**§ 207. Action Taken Outside of Meeting.**

Whenever any resolution in writing may be signed, or any proposed action acquiesced in in writing by all the members of the board of directors or the executive committee, such resolution or proposed action shall be taken and considered to be the act of the board of directors, or the executive committee, as the case may be, with the

same force and effect as if the same had been duly approved by the same vote at a meeting of the board or of the executive committee, respectively, duly called and convened; and it shall be the duty of the secretary of the company to cause such action to be recorded in the minute book of the company with the same particularity as if it had been so approved.

### § 208. Power of Directors to Sell Business as an Entirety.

The board of directors shall have power to sell, assign, transfer, convey, or otherwise dispose of the whole or any part of the property or assets of the corporation as an entirety or going concern, either for cash, or in exchange for other property or securities, on such terms and conditions as they may deem proper and fair to the interests of the stockholders.

### § 209. Cumulative Voting.

In all elections for directors, each stockholder shall have the right to vote the number of shares of stock owned by him for as many persons as there are directors to be elected, or to cumulate said votes and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit.

### § 210. Power to Create Voting Trusts.

The holders of all or any part of the shares of the capital stock of the corporation shall have the right from time to time, at their discretion, to create and form a voting trust.

### § 211. Removal of Directors.

By the written direction, or pursuant to the affirmative vote, in person or by proxy, of the holders of two-thirds of the capital stock of the company, any director or directors may be removed at any time, with or without cause. Only stockholders shall be eligible as directors, and, if a director ceases for any reason to be a stockholder, he shall cease *ipso facto* to be a director, and his office shall thereupon become vacant. In case of any vacancy in the board of directors through death, resignation, disqualification, removal, or any other cause, the vacancy or vacancies shall be filled by the stockholders.

**§ 212. Restriction as to Issue of Additional Capital Stock.**

After stock of the company to the amount of \$50,000, being \$5,000 of preferred stock and \$45,000 of common stock, shall have been issued and sold, no further or additional stock shall be sold or issued, save as authorized by a vote of two-thirds of the holders of each class of stock, common and preferred, voting separately, and by vote of three-fourths of the board of directors.

*Note:* A clause of this kind is used where the authorized capital stock is made larger than is immediately required, and when it is desired to limit the powers of the directors with respect to the issue of the additional capital.

## CHAPTER XI

## ESSENTIALS OF INITIAL MEETING OF INCORPORATORS

- § 213. Commencement of Corporate Life.
- 214. Place of Holding Initial Meeting.
- 221. Time of Holding Meeting.
- 223. Papers Prepared in Advance.
- 224. Notice of Meeting.
- 225.     1. Requisites.
- 226.     2. Form.
- 227.     3. Notice by Publication.
- 228.         Manner of Publication.
- 229.     4. Waiver.
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- 232.         Waiver of Notice.
- 233.     6. To Increase Capital Stock.
- 234.         Waiver of Notice.
- 235.         Illegality of Waivers.
- 236. Transfer of Subscription.
- 237.     Form.
- 238. Proxy.
- 239.     Form.
- 240. Quorum.

## § 213. Commencement of Corporate Life.

It is frequently provided by statute that the existence of a corporation shall commence with the filing of the certificate. In the absence of statute the general rule is that the corporation is "deemed to exist from the time when the certificate of incorporation prescribed by the governing statute is executed, acknowledged, and recorded, or filed for record, in accordance with the governing statute."<sup>1</sup> This rule, however, must be understood with some qualifications. If the corporation perfects its organization properly, no doubt its existence will be held to date back to the time of the filing of the certificate.

<sup>1</sup> 10 Cyc. 223.

But if it should happen that the initial meeting for the purpose of organization should be held outside the state conferring the charter, then, in accordance with a long line of authorities, it might well be held in a proper proceeding that the corporation never was validly organized, and that the alleged stockholders therein are liable as partners.<sup>2</sup> It becomes therefore important to know where the initial meeting must be held, and what the consequences of holding such meeting in a different place would be.

### § 214. Place of Holding Initial Meeting.

It is a fundamental principle of corporation law that the meetings of stockholders must be held within the limits of the state creating the corporation.<sup>3</sup> In this connection the same distinction has been drawn between meetings for the purpose of performing "constituent" acts and those which do not, as has been drawn in the case of directors' meetings.<sup>4</sup> But it is obvious that the *first* meeting of incorporators must be one for the purpose of doing constituent acts. It is at this meeting that directors are elected, by-laws adopted, and other things done which permit the corporation to start out upon its career. Accordingly it has been held in a number of cases that so-called corporations whose initial meetings have been held beyond the borders of the parent state are dead things ab initio, having never had breathed into them the breath of

<sup>2</sup> *Owen v. Shepard*, 59 Fed. 746, 8 C. C. A. 244; *Duke v. Taylor*, 37 Fla. 64, 19 South. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; *Bigelow v. Gregory*, 73 Ill. 197; *Williams v. Hewitt*, 47 La. Ann. 1076, 17 South. 496, 49 Am. St. Rep. 394; *Hill v. Beach*, 12 N. J. Eq. 31.

<sup>3</sup> *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738; *Webb v. Midway Lumber Co.*, 68 Mo. App. 546; *McConnell v. Combination Min. & Mill. Co.*, 30 Mont. 239, 76 Pac. 194, 104 Am. St. Rep. 703; *Heath v. Silverthorn Lead Mining & Smelting Co.*, 39 Wis. 146; 2 Cook, Corp. § 589.

<sup>4</sup> *Supra*, chapter X, §§ 167-171; 10 Cyc. 320.

life. The structures have been created, but no spark of vitality has ever been infused into them.<sup>5</sup>

§ 215. The question of the validity or invalidity of the corporate organization under such circumstances will nevertheless seldom be inquired into by the courts, and the corporation will be generally treated as existing *de facto* if not *de jure*. The party seeking to raise the question will generally be estopped from so doing. For instance, a corporation itself will be estopped from attacking its own existence.<sup>6</sup> So, also, are the stockholders who participate in the meeting.<sup>7</sup> Persons

<sup>5</sup> *Bank of Augusta v. Earle*, 13 Pet. (U. S.) 519, 10 L. Ed. 274; *Jones v. Pearl Mining Co.* 20 Colo. 417, 38 Pac. 700; *Duke v. Taylor*, 37 Fla. 64, 19 South. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; *Miller v. Ewer*, 27 Me. 509, 46 Am. Dec. 619; *Freeman v. Machias Water Power & Mill Co.*, 38 Me. 343; *Smith v. Silver Valley Min. Co.*, 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342; *Hodgson v. Duluth, H. & D. R. Co.*, 46 Minn. 454, 49 N. W. 197; *Hill v. Beach*, 12 N. J. Eq. 31; *Franco-Texan Land Co. v. Laigle*, 59 Tex. 339.

<sup>6</sup> *Phinizy v. Augusta & K. R. Co.* (C. C.) 62 Fed. 678; *McCullough v. Talladega Ins. Co.*, 46 Ala. 376; *McKee v. Title Insurance & Trust Co.*, 159 Cal. 206, 113 Pac. 140; *Southern Bank of Georgia v. Williams*, 25 Ga. 534; *Independent Order of Mutual Aid v. Paine*, 122 Ill. 625, 14 N. E. 42; *Ewing v. Robeson*, 15 Ind. 26; *Humphrey v. Patrons' Mercantile Ass'n*, 50 Iowa, 607; *Beal v. Bass*, 86 Me. 325, 29 Atl. 1088; *Grape Sugar & Vinegar Mfg. Co. of Baltimore v. Small*, 40 Md. 395; *Dooley v. Cheshire Glass Co.*, 15 Gray (Mass.) 494; *Merrick v. Reynolds Engine & Governor Co.*, 101 Mass. 381; *Empire Mfg. Co. v. Stuart*, 46 Mich. 482, 9 N. W. 527; *Scheufler v. Grand Lodge A. O. U. W. of Minnesota*, 45 Minn. 256, 47 N. W. 799; *Roll v. St. Louis & C. Smelting & Mining Co.*, 52 Mo. App. 60; *Abbott v. Aspinwall*, 26 Barb. (N. Y.) 202; *Rush v. Halcyon Steamboat Co.*, 84 N. C. 702; *Callendar v. Painesville & H. R. Co.*, 11 Ohio St. 516; *Hamilton v. Clarion, M. & P. R. Co.*, 144 Pa. 34, 23 Atl. 53, 13 L. R. A. 779; *Johnston v. South Western Railroad Bank*, 3 Strob. Eq. (S. C.) 263; *Heath v. Silverthorn Lead Mining & Smelting Co.*, 39 Wis. 146; *Williams v. Stevens Point Lumber Co.*, 72 Wis. 487, 40 N. W. 154; 10 Cyc. 249. See chapter III, § 36.

<sup>7</sup> *Casey v. Galli*, 94 U. S. 673, 24 L. Ed. 168; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Handley v. Stutz*, 139 U. S. 417, 11 Sup.

dealing with a de facto corporation as such are estopped to deny its corporate existence.<sup>8</sup>

§ 216. There are, however, cases where such irregularities might be shown. The state may always, in a direct proceed-

Ct. 530, 35 L. Ed. 227; *Rockville & W. Turnpike Road v. Van Ness*, Fed. Cas. No. 11,986, 2 Cranch, C. C. 449; *Upton v. Hansbrough*, Fed. Cas. No. 16,801, 3 Biss. 417; *National Commercial Bank v. McDonnell*, 92 Ala. 387, 9 South. 149; *Keyser v. Hitz*, 2 Mackey (D. C.) 473; reversed on another point 111 U. S. 722, 4 Sup. Ct. 613, 28 L. Ed. 577; *Rice v. Rock Island & A. R. Co.*, 21 Ill. (11 Peck) 93; *Goodrich v. Reynolds*, 31 Ill. 490, 83 Am. Dec. 240; *Stoops v. Greensburgh & B. Plank-Road Co.*, 10 Ind. 47; *McCune Min. Co. v. Adams*, 35 Kan. 193, 10 Pac. 468; *East Pascagoula Hotel Co. v. West*, 13 La. Ann. 545; *South Bay Meadow Dam Co. v. Gray*, 30 Me. (17 Shep.) 547; *Baile v. Calvert College Educational Soc. of Carroll County*, 47 Md. 117; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Monroe v. Fort Wayne J. & S. R. Co.*, 28 Mich. 272; *Minnesota Gaslight Economizer Co. v. Denslow*, 46 Minn. 171, 48 N. W. 771; *Ohio & M. R. Co. v. McPherson*, 35 Mo. 13, 86 Am. Dec. 128; *Camp v. Byrne*, 41 Mo. 525; *Home Stock Ins. Co. v. Sherwood*, 72 Mo. 461; *Ossipee Hosiery Woolen Mfg. Co. v. Canney*, 54 N. H. 295; *Oswego & Syracuse Plank Road Co. v. Rust*, 5 How. Prac. (N. Y.) 390; *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *White's Creek Turnpike Co. v. Davidson County*, 3 Tenn. Ch. 396; *Ogden Clay Co. v. Harvey*, 9 Utah, 497, 35 Pac. 510; *Connecticut & P. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181; *Montpelier & W. R. R. Co. v. Langdon*, 46 Vt. 284; *Greenbrier Industrial Exposition v. Squires*, 40 W. Va. 307, 21 S. E. 1015, 52 Am. St. Rep. 884; 10 Cyc. 249.

<sup>8</sup> *Frost v. Frostburg Coal Co.*, 65 U. S. (24 How.) 278, 16 L. Ed. 637; *Oregonian R. Co. v. Oregon R. & Nav. Co.* (C. C.) 22 Fed. 248; *In re Western Bank & Trust Co.* (D. C.) 163 Fed. 713; *Cahall v. Citizens' Mut. Bldg. Ass'n*, 61 Ala. 232; *Town of Searcy v. Yarnell*, 47 Ark. 269, 1 S. W. 319; *Granger's Business Ass'n v. Clark*, 67 Cal. 634, 8 Pac. 445; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531; *Ohio Nat. Bank of Washington v. Central Construction Co.*, 17 App. D. C. 524; *Wood v. Coosa & C. R. Co.*, 32 Ga. 273; *Tarbell v. Page*, 24 Ill. (14 Peck) 46; *Jones v. Cincinnati Type Foundry Co.*, 14 Ind. 89; *Washington College v. Duke*, 14 Iowa, 14; *Pape v. Capitol Bank of Topeka*, 20 Kan. 440, 27 Am. Rep. 183; *Henderson & N. R. Co. v. Leavell*, 55 Ky. (16 B. Mon.) 358; *Worcester Medical Inst. v. Harding*, 65 Mass. (11 Cush.) 285; *St.*

ing for that purpose, obtain a judgment of ouster.<sup>9</sup> The question has been raised in a proceeding by stockholders to enjoin a corporation from forfeiting stock for the nonpayment of assessments thereupon.<sup>10</sup> In the case cited in the note it appeared that a special charter had been granted by the Legislature of North Carolina, which was accepted at a meeting of the incorporators held in the city of Baltimore, Md., where they elected a president, secretary, and treasurer, adopted a seal, and performed all the necessary acts leading up to the organization of the company for the purpose of doing business. Apparently neither party raised the question of the illegality in the original meeting of incorporators, the complainant claiming merely that the meeting of directors held in Maryland at which the forfeiture was declared was a nullity. But the court, of its own motion, went back to the original irregularity in not holding the initial meeting in North Carolina, and held that the corporation had no legal existence, and dismissed the bill of complaint upon that ground.

Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66; Johnston v. Gumbel (Miss.) 19 South. 100; Hamtramck v. Bank of Edwardsville, 2 Mo. 169; Livingston Loan & Building Ass'n v. Drummond, 49 Neb. 200, 68 N. W. 375; White v. Ross, 15 Abb. Prac. (N. Y.) 66; Cochran v. Arnold, 58 Pa. (8 P. F. Smith) 399; McCord & Nave Mercantile Co. v. Glenn, 6 Utah, 139, 21 Pac. 500; President, etc., of Bank of Manchester v. Allen, 11 Vt. 302; Singer Mfg. Co. v. Bennett, 28 W. Va. 16; 10 Cyc. 245-248. See *infra*, chapter XIII, § 259.

<sup>9</sup> Rondell v. Fay, 32 Cal. 354; North v. State, 107 Ind. 356, 8 N. E. 159; Musgrave v. Morrison, 54 Md. 161; Catholic Church at Lexington v. Tobbein, 82 Mo. 418; Elizabethtown Gaslight Co. v. Green, 46 N. J. Eq. (1 Dick.) 118, 18 Atl. 844; Palmer v. Lawrence, 5 N. Y. Super. Ct. (3 Sandf.) 161; Caryl v. McElrath, 5 N. Y. Super. Ct. (3 Sandf.) 176; Buncombe Turnpike Co. v. McCarson, 18 N. C. (1 Dev. & B.) 306; Boardman v. Keystone Standard Watch Co., 8 Lanc. Law Rev. (Pa.) 25; 10 Cyc. 1291; 1 Clark & M. Corp. §§ 70, 71, 81, 93.

<sup>10</sup> Smith v. Silver Valley Mining Co., 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760.

§ 217. In the case of *Miller v. Ewer*,<sup>11</sup> which was an action of ejectment, the plaintiffs claimed title through a deed from a company which had received a charter from the state of Maine, but which held its meeting for organization in the city of New York, where the charter was accepted. It was held that, inasmuch as all subsequent proceedings were based upon this extraterritorial meeting, no deed could have been either authorized or delivered by this company, which, because of such extraterritorial initial meeting, never had a legal existence.

§ 218. In *Duke v. Taylor*<sup>12</sup> the "Florida Orange Hedge Fence Company" executed its negotiable promissory note signed by said name, "by its Pres., Jno. W. Childress, James A. Knox, as Secretary and Treasurer." This note came into the hands of the plaintiff for value before maturity. At maturity, the note remaining unpaid, the holder filed his suit against sixteen persons, comprising said alleged company, seeking to hold them liable upon the note as partners. The evidence showed that the state of Tennessee had granted a charter to these defendants under its general laws, but that the meeting for organization had been convened in the state of Florida. The court held that no valid organization had taken place. It also held that the holder of the note was not estopped to deny the corporate existence, for the reason that the note contained "no recital that the company in whose name it was executed was a corporation," and there was nothing to overcome the evidence of the plaintiff that he did not know that the company was a corporation when he received the note, and that it did not appear that he "contracted with or dealt with the company as a corporation."

§ 219. As we have heretofore had occasion to point out, in many states the statutes expressly permit the stockholders' meetings to be held outside of the state granting the charter,

<sup>11</sup> 27 Me. 509, 46 Am. Dec. 619.

<sup>12</sup> 37 Fla. 64, 19 South. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484.

and in some of them it is enacted that even the initial meeting may be so held. Few cases have arisen in which the validity of such statutes has been called into question. Upon general principles it would seem that the courts of no state are bound to recognize as a corporation individuals who, residing elsewhere, merely file articles of incorporation in a given political territory without themselves at any time coming within its jurisdiction. If citizens of New York may take advantage of the New Jersey laws for the purpose of incorporation, the laws of the latter state being more favorable for certain purposes than those of their own, then upon the same principles it would seem equally competent for these persons to seek to protect themselves from liability for their acts by pretending to avail themselves of the laws of China or Corea. Under the broad principles which now prevail recognizing the right of corporations legally created in one jurisdiction to transact business in another, it is quite possible that even the laws of China or Corea might confer corporate privileges, provided such nation once acquired jurisdiction for this purpose.<sup>13</sup>

Having acquired jurisdiction, it might then send out its corporations into other countries, with powers which would be elsewhere recognized under principles of international comity, even with the power to hold corporate meetings to perform constituent acts elsewhere. But, in order that that jurisdiction should once attach, it would seem that the *initial* meeting of the incorporators should be held within the state which confers the corporate privileges. After that there is little practical danger that the question of the right to hold stockholders' meetings elsewhere could be attacked with much success. Cer-

<sup>13</sup> *Liverpool & L. Life & Fire Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566, 19 L. Ed. 1029; *Oregonian R. Co. v. Oregon R. & Navigation Co.* (C. C.) 23 Fed. 232, reversed on another point *Oregon R. & Navigation Co. v. Oregonian R. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 837; *Merrick v. Van Santvoord*, 34 N. Y. 208; *King v. Sarria*, 69 N. Y. 24, 25 Am. Rep. 128; *General Corporation Act* N. J. (P. L. 1896, p. 307) § 95, as amended by P. L. 1903, p. 41.

tainly the state which by its legislation permits this very thing to be done could not question it. No more could the corporation itself, or a stockholder or a creditor contracting with the company as a corporation. Certain expressions used in the opinions in the cases cited in the note seem to countenance this doctrine.<sup>14</sup>

§ 220. It is quite probable, though by no means settled, that a court in another state would give effect to the statutory power conferred upon a corporation of holding its stockholders' meetings beyond the limits of the state conferring the charter, and would not raise the question, as they did in *Smith v. Silver Valley Min. Co.*,<sup>15</sup> or permit it to be raised by a third party, as in *Camp v. Byrne*.<sup>16</sup>

### § 221. Time of Holding Meeting.

Many of the states provide a maximum or minimum time or both after the filing of the certificate when the initial meeting of the incorporators must be held. Such statutes should be carefully followed. In the absence of such legislation, all that is required is that the meeting be held within a reasonable time after the certificate is filed.

§ 222. Even where the time for the meeting is limited by law, it is quite competent for such requirement to be waived, provided all the incorporators unite in the waiver.<sup>17</sup> This waiver, in order to be effectual as to all, must be absolutely unanimous, although all of the incorporators need not sign a

<sup>14</sup> *Graham v. Boston, H. & E. R. Co.*, 118 U. S. 161, 6 Sup. Ct. 1009, 30 L. Ed. 196; *Jones v. Pearl Mining Co.*, 20 Colo. 417, 38 Pac. 700; *Duke v. Taylor*, 37 Fla. 64, 19 South. 172, 53 Am. St. Rep. 232, 31 L. R. A. 484; *Craig Silver Co. v. Smith*, 163 Mass. 262, 39 N. E. 1116.

<sup>15</sup> 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760.

<sup>16</sup> 41 Mo. 525.

<sup>17</sup> *Coe v. East & W. R. Co. (C. C.)* 52 Fed. 531; *Braintree Water-Supply Co. v. Braintree*, 146 Mass. 482, 16 N. E. 420; 2 Cook, Corp. § 599. See *infra*, §§ 231, 516.

paper to that effect, their presence and participation without objection in the meeting constituting a sufficient waiver.<sup>18</sup>

### § 223. Papers Prepared in Advance.

In order to make sure that all the legal steps, as well as those matters important from a business standpoint, are safeguarded, it is customary for all the papers relating to this initial meeting to be prepared in advance, including notice of meeting or waiver of such notice, waiver of notice of assessment, waiver of notice of meeting to increase capital stock, transfer of subscription, proxies, newspaper publications, etc. Even the minutes of the meeting itself are generally prepared in advance. Careful counsel will always see to this, and take care that at the meeting all motions, resolutions, etc., mentioned in the minutes are really put and carried. The duty of counsel does not stop with the mere preparation of the certificate of incorporation. Even the by-laws ought to be prepared, at least in tentative shape, before anything whatever is done in the way of legally organizing the corporation.

### § 224. Notice of Meeting.

If for any reason it is not practicable to procure a waiver from all of the incorporators, and those from whom waivers cannot be procured will be absent from the meeting, it is of the highest importance that the proper notice of the initial meeting should be given to each and every incorporator and

<sup>18</sup> *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Synnott v. Cumberland Bldg. Loan Ass'n*, 117 Fed. 379, 55 C. C. A. 553; *Kenton Furnace R. & Mfg. Co. v. McAlpin* (C. C.) 5 Fed. 737; *Crook v. International Trust Co. of Maryland*, 32 App. D. C. 490; *Hussey v. Gallagher*, 61 Ga. 86; *Judah v. American Live Stock Ins. Co.*, 4 Ind. 333; *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, 54 Atl. 254; *Benbow v. Cook*, 115 N. C. 324, 20 S. E. 453, 44 Am. St. Rep. 454; *Germer v. Triple State Natural Gas & Oil Co.*, 60 W. Va. 143, 54 S. E. 509.

subscriber to the stock. Otherwise the action taken thereat would be invalid.<sup>19</sup>

### § 225. Requisites of Notice.

If a statutory mode of giving notice is fixed, that mode must be followed; if not, the requisites of the notice may be said to be five in number: First, it must be issued by one who has authority to issue it;<sup>20</sup> second, it must be issued a reasonable length of time before the meeting is to be held, and this need not be a sufficient length of time to give each incorporator actual notice, if any of them are situated so far away that an actual notice to them would be unreasonable;<sup>21</sup> third, it must state the time of the meeting, unless this is fixed in the charter; fourth, it must state the place where the meeting is to be held, unless this is fixed in the charter; fifth, it must state the business to be transacted thereat.<sup>22</sup> It has been held that a verbal notice of a meeting of shareholders is insufficient as to persons who do not appear at the meeting in response thereto, where the articles of association provide that notice of meetings shall be given by sending to the shareholders a written or printed notice.<sup>23</sup>

<sup>19</sup> *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Davies v. Monroe Waterworks & Light Co.*, 107 La. 145, 31 South. 694; *Wiggin v. Elder, etc., of First Freewill Baptist Church*, 49 Mass. (8 Metc.) 301; *Stein v. Marks*, 89 N. Y. Supp. 921, 44 Misc. Rep. 140, 15 N. Y. Ann. Cas. 155; *Summers v. Glen. Gold & Silver Min. Co.*, 15 S. D. 20, 86 N. W. 749; *Stevens v. Eden Meeting-House Soc.*, 12 Vt. 688; 10 Cyc. 323, 324; 3 Cook, Corp. § 594. See *infra*, chapter XIII, § 264; chapter XVI, § 330.

<sup>20</sup> *Evans v. Osgood*, 18 Me. (6 Shep.) 213; *State ex rel. Guerrero v. Pettinelli*, 10 Nev. 141; *Reilly v. Oglebay*, 25 W. Va. 36.

<sup>21</sup> *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854.

<sup>22</sup> *Beecher v. Marquette & Pacific Rolling Mill Co.*, 45 Mich. 103, 7 N. W. 695; 3 Clark & M. Corp. §§ 647, 648; 10 Cyc. 324, 325; 2 Cook, Corp. § 595.

<sup>23</sup> *Westcott v. Minnesota Mining Co.*, 23 Mich. 145.

§ 226. Form of Notice.

The following form of notice will generally suffice:

New York City, ....., 19...

Mr. John Doe, 422 Fourth St., N. W., Washington, D. C.

Dear Sir: You are hereby notified that the initial meeting of the incorporators and subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of New York, will be held at ....., in the city of New York, on the ..... day of ....., A. D. 19.., at ..... o'clock ..... m., for the purpose of transacting any and all business which may legally come before such initial meeting.

.....

§ 227. Notice by Publication.

If notice is required to be published and no particular form is prescribed in the statute or articles of incorporation, the following form will answer:

Notice is hereby given that the initial meeting of the incorporators and subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of New York, will be held at ....., in the state of New York, on the ..... day of ....., A. D. 19.., at ..... o'clock ..... m., for the purpose of transacting any and all business which may legally come before such initial meeting.

.....

§ 228. Manner of Publication.

This notice should be published in such number of newspapers for such length of time and at such intervals as the statute prescribes.

§ 229. Waiver of Notice of Initial Meeting of Incorporators.

Where, as is generally the case with a new corporation, the relations of all parties are amicable, and some of the incorporators find it inconvenient to attend, it is customary to obtain from them a waiver of formal notice. This waiver may be in the following form:

## § 230.

The undersigned, incorporators and subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of ....., do hereby waive legal notice of the time, place, and purpose of the initial meeting of such incorporators and subscribers, and do hereby call said meeting to be held at ....., in the state of ....., on the ..... day of ..... A. D. 19.., at the hour of ..... o'clock in the .....noon, and we consent that at such meeting any and all business which may pertain to the affairs of the company may be transacted.

In testimony whereof we have signed these presents on this ..... day of ....., A. D. 19..

Witness: .....

.....  
.....

## § 231. Notice of Meeting for Assessment.

It is frequently required that before an assessment can be levied upon the stock subscribed for there must be notice given for a certain length of time, either by publication or in some other manner. This requirement may also be waived by a document signed by all parties interested, in the following or equivalent form:<sup>24</sup>

## § 232. Waiver of Notice of Assessment.

The undersigned, subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of ....., do hereby waive all legal notice, by publication or otherwise, of the time, place, and manner of making payment of our several subscriptions, and of the meeting to determine the same, and we hereby severally agree to pay any part or all of the same at such time or times, and in such amounts, as the board of directors may in its discretion designate.

In testimony whereof we have signed these presents this ..... day of ....., A. D. 19..

Witness: .....

.....  
.....

<sup>24</sup> See *supra*, § 222.

## § 233. Notice of Meeting to Increase Capital Stock.

Inasmuch as at the first meeting of incorporators it may be deemed desirable to authorize the directors to issue stock beyond the amount fixed as that with which the company shall start in business, and as the statutes of many states require certain formalities by way of notice, advertisement, etc., before this can be done, a waiver of these formalities may also be obtained in a form similar to that which follows:

## § 234. Waiver of Notice of Meeting to Increase Capital Stock.

The undersigned, incorporators and subscribers to the capital stock of the ..... Company, a corporation created under the laws of the state of ....., do hereby waive all legal and statutory requirements as to notice of the time and place of the meeting for the purpose of considering a proposition to increase the company's capital stock, and the number of shares thereof, and do consent that such matters may be considered at a meeting of the incorporators and subscribers to the capital stock to be held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the .....noon; and do also consent and agree that at said meeting or any other meeting the board of directors may be authorized and directed to take appropriate action in that regard, and from time to time issue such additional shares as they may deem proper, up to the maximum amount of the capital stock limited by the charter.

In testimony whereof we have signed these presents this ..... day of ....., A. D. 19..

Witness: .....

.....  
 .....

## § 235. Illegality of Such Waivers.

Attention should be called to the fact that while such waivers are very common, yet where the Constitution of a state provides that the stock of corporations shall not be increased except pursuant to general law and with the consent of persons holding the majority of the stock, obtained at a meeting called by it, giving public notice thereof, the provisions of the statute requiring that the call of the meeting to authorize

an increase of the capital stock shall be published in a weekly newspaper for a stated time, and that such notice shall also be given to the stockholders in writing, cannot be waived by all the stockholders, because such public notice is intended to be for the benefit of the public, and not of the stockholders.<sup>25</sup>

### § 236. Transfer of Subscription.

Should any subscriber, before stock is issued to him, desire to transfer his rights in such stock to another person, as is frequently done prior to the initial meeting, he may do this by a document substantially like the one following:<sup>26</sup>

### § 237. Form of Transfer of Subscription.

Know all men by these presents, that the undersigned, for value received, has sold, assigned, transferred, and set over, and by these presents does sell, assign, transfer, and set over, unto ....., all the right, title, and interest of the undersigned, as an incorporator of, or subscriber to the stock of, the ..... Company, a corporation created under the laws of the state of ....., to the extent of ..... shares thereof, and hereby requests the said company to issue a certificate for the number of shares last aforementioned to the said ..... or his assigns, instead of to the undersigned.

In testimony whereof the undersigned has hereunto set his name and affixed his seal this ..... day of ....., A. D. 19...

Witness: ..... [Seal.]

The said transfer is hereby assented to by this company.

..... Company,  
By ....., President.

### § 238. Proxy for Initial Meeting.

When the incorporators or a majority of them are nonresident, it is a common practice, and one which has never been

<sup>25</sup> State ex rel. Donnell Mfg. Co. v. McGrath, 86 Mo. 239.

<sup>26</sup> Valentine ex rel. Dudley v. Berrien Springs Water Power Co., 128 Mich. 280, 87 N. W. 370; Manchester Street Ry. Co. v. Williams, 71 N. H. 312, 52 Atl. 461. See chapter V, § 63.

successfully assailed, for these persons to send their proxies to parties within the state, or to deliver them to persons who journey to the state for the purpose of holding the initial meeting, and the persons holding proxies need not be stockholders or entitled to stock.<sup>27</sup> It has been held that there must be at least two persons present, for otherwise the term "meeting" would be a misnomer.<sup>28</sup> A simple form of proxy for this purpose would be as follows:

### § 239. Form of Proxy.

The undersigned, one of the incorporators of the ..... Company (a subscriber to ..... shares of stock therein), hereby constitutes and appoints ..... as proxy, with full power of substitution and revocation, to vote for and in the name of the undersigned at the initial meeting of the incorporators of said company to be held at ..... on the ..... day of ....., A. D. 19.., and at any adjournment thereof, giving and granting unto said proxy full power to act for and on behalf of the undersigned in the transaction of any business which may legally come before said meeting, to the same extent as the undersigned could do if personally present; it being the intention of the undersigned that this proxy shall cover all the interest in said company owned by him or to which he may be entitled at any time that this proxy may be used.

In testimony whereof the undersigned has hereunto signed his name and affixed his seal this ..... day of ....., A. D. 19..

..... [Seal.]

Witness: .....

<sup>27</sup> *People's Home Savings Bank v. Superior Court of City & County of San Francisco*, 104 Cal. 649, 38 Pac. 452, 43 Am. St. Rep. 147, 29 L. R. A. 844; *In re Lighthall Mfg. Co.*, 47 Hun (N. Y.) 258; *State ex rel. Schwartz v. Ohio & M. Ry. Co.*, 6 Ohio Cir. Ct. R. 415. See *infra*, chapter XIII, § 282.

<sup>28</sup> *Sharp v. Dawes*, 2 Q. B. Div. 26; *In re Sanitary Carbon Co.* (1877), 12 Wkly. Notes, 223; 2 Cook, Corp. bottom p. 1298. *Contra*: *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174. See *infra*, § 241.

§ 240. **Quorum.**

At common law the rule seems to be that, except where the rule of voting is by shares, those incorporators and subscribers who attend a duly called meeting may transact the business of that meeting, although a majority in interest or in number is not present.<sup>29</sup> If the statute or charter, however, lays down a different rule, in order that business done at such meeting may be legal, a quorum must be present. Of those who attend, the majority rule.<sup>30</sup>

§ 241. Most modern business corporations are governed by statutes or charters entitling each share of stock to one vote. In such case the rule above announced<sup>31</sup> would not govern. It applies only to bodies composed of an indefinite number of persons, which would be the status of a corporation issuing shares of stock which may be assigned at will, giving each certificate holder a right to vote irrespective of the number of shares he holds. But where each share is entitled to one vote, as is now generally the case, the number of possible votes is definitely fixed, and a majority in interest must be present in order to constitute a quorum. Although some authority is found to the contrary,<sup>32</sup> it is believed that it would not be safe to proceed with the initial meeting of incorpora-

<sup>29</sup> In re Rapid Transit Ferry Co., 15 App. Div. 530, 44 N. Y. Supp. 539; Field v. Field, 9 Wend. (N. Y.) 395; Madison Ave. Baptist Church v. Baptist Church of Oliver St., 28 N. Y. Super. Ct. (5 Rob.) 649; 2 Cook, Corp. § 607; 3 Clark & M. Corp. p. 1981; 10 Cyc. 329.

<sup>30</sup> State v. Chute, 34 Minn. 135, 24 N. W. 353; In re Rapid Transit Ferry Co., 15 App. Div. 530, 44 N. Y. Supp. 539; Madison Ave. Baptist Church v. Baptist Church of Oliver St., 28 N. Y. Super. Ct. (5 Rob.) 649; 2 Cook, Corp. § 607; 3 Clark & M. Corp. p. 1981; 10 Cyc. 329.

<sup>31</sup> See supra, § 240.

<sup>32</sup> Morrill v. Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; In re Rapid Transit Ferry Co., 15 App. Div. 530, 44 N. Y. Supp. 539; In re Granger, 7 Phila. (Pa.) 350; Craig v. First Presbyterian Church of Pittsburgh, 88 Pa. 42, 32 Am. Rep. 417.

tors unless such majority should be present either in person or by proxy.<sup>33</sup> And there must be at least two persons actually present.<sup>34</sup>

§ 242. Where a charter or a statute positively requires that a certain number of persons shall be present at the consummation of an act, the act is not valid, though it be begun while all are present, if one of the persons departs, though wrongfully, before it is consummated.<sup>35</sup> On the other hand, not even a majority of stockholders may withdraw from a meeting in order to break up a quorum, and then expect to obtain relief through a court on the ground that a quorum was not present.<sup>36</sup> If the statute of a state positively determines what shall constitute a quorum, no by-law fixing a less number will be valid.<sup>37</sup> After the meeting is over and the action recorded, it will be presumed that a quorum was present, in the absence of any showing to the contrary.<sup>38</sup>

<sup>33</sup> *Haskell v. Read*, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253; 10 Cyc. 346.

<sup>34</sup> See *infra*, § 238.

<sup>35</sup> *Ex parte Rogers*, 7 Cow. (N. Y.) 526, 530, note.

<sup>36</sup> *Commonwealth v. Vandegrift*, 232 Pa. 53, 81 Atl. 153, 36 L. R. A. (N. S.) 45, Ann. Cas. 1912C, 1267.

<sup>37</sup> *Clark v. Wild* (Vt. 1911) 81 A. 536.

<sup>38</sup> *National Council, Junior Order United American Mechanics of the United States v. State Council of District of Columbia, Junior Order United American Mechanics*, 27 App. D. C. 1.

## CHAPTER XII

## STOCKHOLDERS

- § 243. Right to Contract.
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- 245. Right to Inspect Records.
- 246. Distribution of Stock on Increase.
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- 256. 2. Corporation Organized for Illegal Object.
- 257. 3. Assessment on Stock—Call by Corporation.
- 258. 4. To Creditors.

## § 243. Right to Contract.

A stockholder in a corporation has a financial interest in it to the extent of his stock. He is, therefore, in common with all the other stockholders, interested in its success and injured by its failure. But this does not necessarily constitute him a trustee or agent either for the company or for the other stockholders, even if he happens to be a majority owner, nor does it constitute him a partner with the others. He may, acting in good faith, purchase the property of the corporation at a sale for which he voted the stock.<sup>1</sup>

<sup>1</sup> *Memphis & L. R. R. Co. v. Dow* (C. C.) 19 Fed. 388; *Hayden v. Official Hotel Red Book & Directory Co.* (C. C.) 42 Fed. 875; *Baker v. Backus' Adm'r*, 32 Ill. 79; *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407; *Pratt v. Bacon*, 27 Mass. (10 Pick.) 123; *McNamee v. Relf*, 52 Miss. 426; *Stratton v. Allen*, 16 N. J. Eq. (1 C. E. Green) 229;

**§ 244. Claims against Corporation.**

He is, like any other person, entitled to compensation for services rendered the corporation, where the circumstances do not negative the usual presumption that a party to whom services are rendered at its request is expected to pay for them.<sup>2</sup> He may recover damages for its negligence.<sup>3</sup> If a stockholder becomes a creditor of the corporation, he has the same right as an outsider to sue the company and to levy an attachment or execution.<sup>4</sup>

**§ 245. Right to Inspect Records.**

This subject has been heretofore discussed.<sup>5</sup>

**§ 246. Distribution of Stock on Increase.**

If an increase of stock is authorized, the existing stockholders must be given the right to subscribe for these new shares before they are offered to the public. The stockholders may, of course, waive their right by failing to avail themselves of it within a reasonable time.<sup>6</sup> But this principle does not apply

*Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. (N. Y.) 83; *Taylor v. West Liberty Wheel Co.*, 6 Ohio Dec. 947, 9 Am. Law Rec. 28; *Western Mining & Mfg. Co. v. Peytonia Cannel Coal Co.*, 8 W. Va. 406. See *infra*, § 251.

<sup>2</sup> *Culbertson v. Wabash Navigation Co.*, Fed. Cas. No. 3,464, 4 McLean, 544; *Barker v. Cairo & F. R. Co.*, 3 Thomp. & C. (N. Y.) 328; *Spence's Adm'r v. Whitaker*, 3 Port. (Ala.) 297; *Schrader v. Heinzelman*, 51 Ill. App. 31; *Blalock v. Kernersville Mfg. Co.*, 110 N. C. 99, 14 S. E. 501; *Revere v. Boston Copper Co.*, 32 Mass. (15 Pick.) 351.

<sup>3</sup> *Morbach v. Home Mining Co.*, 53 Kan. 731, 37 Pac. 122.

<sup>4</sup> *Peirce v. Partridge*, 44 Mass. (3 Metc.) 44; *Sargent v. Webster*, 54 Mass. (13 Metc.) 497, 46 Am. Dec. 743.

<sup>5</sup> Chapter X, § 177.

<sup>6</sup> *Snelling v. Richard (C. C.)* 166 Fed. 635; *Knapp v. Publishers: George Knapp & Co.*, 127 Mo. 53, 29 S. W. 885; *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120; *Way v. American Grease Co.*,

if the new issue of stock is to be entirely devoted to purchasing additional property, because, if it should, the very object for which it was authorized would fail.<sup>7</sup> If it is desired to sell the additional shares for less than par, then, if the actual value of the corporate assets justifies a stock dividend, this is frequently resorted to. By unanimous consent of the stockholders the stock thus issued to them by way of dividends is donated back to the company, and may then be disposed of as full-paid and nonassessable stock for less than its face value.<sup>8</sup> It is by no means uncommon to authorize an increase of capital stock, with the proviso that the stockholders may take the increased stock at its market value above par. If the stockholders all acquiesce in this arrangement, it will, of course, be justifiable. But it seems that any dissenting stockholder may insist upon the right to purchase the new stock at par without paying the additional premium.<sup>9</sup>

60 N. J. Eq. 263, 47 Atl. 44; *Wall v. Utah Copper Co.*, 70 N. J. Eq. 17, 62 Atl. 533; *Waters v. Horace Waters & Co.*, 115 N. Y. Supp. 432, 130 App. Div. 678; *Schmidt v. Pritchard*, 135 Iowa, 240, 112 N. W. 801; *Hall v. Hall*, 30 Ohio Cir. Ct. R. 826; *Strickler v. McElroy*, 45 Pa. Super. Ct. 165; *Electric Co. of America v. Edison Electric Illuminating Co.*, 200 Pa. 516, 50 Atl. 164; *Hoyt v. Shenango Valley Steel Co.*, 207 Pa. 208, 56 Atl. 422; 2 Clark & M. Corp. § 408; 10 Cyc. 543, 544, and cases cited; 1 Cook, Corp. § 286, and notes. See chapter XX, § 428.

<sup>7</sup> *Meredith v. New Jersey Zinc & Iron Co.*, 55 N. J. Eq. 211, 37 Atl. 539, affirmed in 56 N. J. Eq. 454, 41 Atl. 1116; *Bond v. Atlantic Terra Cotta Co.*, 122 N. Y. Supp. 425, 137 App. Div. 671, reversing 123 N. Y. Supp. 1085, 66 Misc. Rep. 546.

<sup>8</sup> *Infra*, § 301.

<sup>9</sup> *Mason v. Davol Mills*, 132 Mass. 76; *Hammond v. Edison Illuminating Co.*, 131 Mich. 79, 90 N. W. 1040, 100 Am. St. Rep. 582; *St. Paul Union Depot Co. v. Minneapolis & N. W. R. Co.*, 47 Minn. 154, 49 N. W. 646, 13 L. R. A. 415; *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120; *Id.*, 67 N. H. 234, 30 Atl. 614, 68 Am. St. Rep. 650; *Dawson v. Insurance Co. of North America*, 6 Pa. Co. Ct. R. 214; *Appeal of Cunningham*, 108 Pa. 546; *De la Cuesta v. Insurance Co. of N. A.*, 136 Pa. 62, 20 Atl. 505, 9 L. R. A. 631. *Contra*: *Stokes v.*

**§ 247. Making By-Laws.**

Where there is no law or usage to the contrary the power to make by-laws resides in the stockholders.<sup>10</sup> By-laws are usually in the nature of restrictions or definitions of the powers of the directors and the officers.

**§ 248. Directors' Functions Distinguished from Stockholders'.**

It is to be observed that the stockholders' authority is, as a rule, confined to *authorizing* the directors to act. The directors do not merely authorize the performance of any act, but *direct* it to be done.<sup>11</sup> Hence the stockholders' meeting will often *authorize* the same act that the directors' meeting subsequently *directs* the proper officers to perform.

**§ 249. Election of Officers.**

The subordinate officers of a corporation are generally elected by the directors,<sup>12</sup> but occasionally provision is made for the election of these officers or some of them by the stockholders. It is not at all infrequent to have the stockholders elect the president of the corporation.<sup>13</sup>

**§ 250. Mortgaging Property.**

At common law the directors appear to have been vested with the power to mortgage the property of a corporation

Continental Trust Co., 91 N. Y. Supp. 239, 99 App. Div. 377, modified and affirmed in 186 N. Y. 285, 78 N. E. 1090, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738.

<sup>10</sup> Morton Gravel Road Co. v. Wysong, 51 Ind. 4. See *infra*, chapter XIII, § 275.

<sup>11</sup> See 2 Cook, Corp. §§ 708, 709; Dill, N. J. Corp. 28, 29.

<sup>12</sup> Batchelor v. Planters' Nat. Bank of Louisville, 78 Ky. 435; Granger v. American Brewing Co., 25 Misc. Rep. 302, 54 N. Y. Supp. 590; Dill, N. J. Corp. p. 5.

<sup>13</sup> Virginia Corporation Act (Laws 1902-04, c. 270, subc. 5) § 10 (1 Code Va. 1904, § 1105e, subd. 10).

without the necessity for any authority from the stockholders.<sup>14</sup> There is a tendency in the legislation of the various states to take away this rather drastic power from the directors and require the previous consent of the stockholders.<sup>15</sup> The charter itself may confer upon the stockholders the right to determine whether the corporate property shall be mortgaged, and, if so, the terms and conditions thereof.<sup>16</sup> It is quite customary to hold a stockholders' meeting for the purpose of giving the authority to mortgage.<sup>17</sup>

### § 251. Duties of Stockholders.

While stockholders have the right to contract with the corporation and with each other,<sup>18</sup> and to reap all the benefits of the corporate relation, these rights so conferred upon them carry correlative duties. The law requires that they act in good faith with each other. The majority stockholding interest in a corporation has a perfect right to control its pol-

<sup>14</sup> *Hodder v. Kentucky & G. E. R. Co.* (C. C.) 7 Fed. 793; *Moran v. Strauss*, Fed. Cas. No. 9,787, 6 Ben. 249; *Ashton v. Lehigh Coal & Navigation Co.*, 49 Pa. (13 Wright) 261; 3 *Cook, Corp.* § 808, and note; 3 *Clark & M. Corp.* § 691c, and notes.

<sup>15</sup> *The Seguranca* (D. C.) 68 Fed. 781; *Nelson v. Hubbard*, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375; *Forbes v. San Rafael Turnpike Co.*, 50 Cal. 340; *Thomas v. Citizens' Horse Ry. Co.*, 104 Ill. 462; *Greenpoint Sugar Co. v. Kings County Mfg. Co.*, 7 Hun (N. Y.) 44; *Greenpoint Sugar Co. v. Whitin*, 69 N. Y. 329; *Rochester Savings Bank v. Averell*, 96 N. Y. 467; *Shoemaker v. Dayton & W. R. Co.* (Ohio Com. Pl.) 19 Wkly. Law Bul. 322.

<sup>16</sup> *Antietam Paper Co. v. Chronicle Pub. Co.*, 115 N. C. 143, 20 S. E. 366.

<sup>17</sup> *De la Vergne Refrigerating Mach. Co. v. German Savings Inst.*, 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65; *Nevada Nickel Syndicate v. National Nickel Co.* (C. C.) 96 Fed. 133; *Edelhoff v. Horner-Miller Mfg. Co.*, 86 Md. 595, 39 Atl. 314; *Magowan v. Groneweg*, 14 S. D. 543, 86 N. W. 626; *Kalamazoo Spring & Axle Co. v. Winans-Pratt Co.*, 106 Mich. 193, 64 N. W. 23; 3 *Cook, Corp.* § 808, and note; *Dill, N. J. Corp.* 4. See 3 *Clark & M. Corp.* § 696, and notes.

<sup>18</sup> See *supra*, § 243.

icy, elect its directors, and generally manage its business;<sup>19</sup> but this right cannot be construed into a power in the incumbents in office to so extend their term of service or to so manipulate the affairs of the company as to work a fraud upon the minority.<sup>20</sup>

### § 252. Sale of Corporate Assets.

The majority stockholders have no right to unnecessarily sell the entire corporate assets for their own private gain and to the injury of the minority.<sup>21</sup>

### § 253. Dissolution of Corporation.

The dissolution of a corporation is a matter which is very largely governed by statute. But if there is no statutory regulation, the stockholders do not have the power of dissolution. This power is vested in the directors.<sup>22</sup>

### § 254. Amending Charter.

This is universally regulated by statute. The power to determine upon such amendments is usually vested in the stockholders, and may be exercised, sometimes by a majority vote, and sometimes by a two-thirds or three-fourths vote, in ac-

<sup>19</sup> *Hand v. Dexter*, 41 Ga. 454; *McBride v. Porter*, 17 Iowa, 203; *State v. Brown*, 73 Md. 484, 21 Atl. 374; *Sewell v. East Cape May Beach Co.*, 50 N. J. Eq. (5 Dick.) 717, 25 Atl. 929; *Bach v. Pacific Mail S. S. Co.*, 12 Abb. Prac. N. S. (N. Y.) 373.

<sup>20</sup> *Meeker v. Winthrop Iron Co. (C. C.)* 17 Fed. 48; *Erwin v. Oregon Ry. & Navigation Co. (C. C.)* 27 Fed. 625; *Lowe v. Pioneer Threshing Co. (C. C.)* 70 Fed. 646; *Mottu v. Primrose*, 23 Md. 482; *Pondir v. New York, L. E. & W. R. Co.*, 72 Hun, 384, 25 N. Y. Supp. 560.

<sup>21</sup> *Erwin v. Oregon Ry. & Navigation Co. (C. C.)* 27 Fed. 625; *Bulkley v. Big Muddy Iron Co.*, 7 Mo. App. 589.

<sup>22</sup> *Willamet Falls C. & L. Co. v. Kittredge*, Fed. Cas. No. 17,105, 5 Sawy. 44; *Curien v. Santini*, 16 La. Ann. 27.

cordance with the terms of the legislative act. But the amendment must be germane to the object of the corporation as originally expressed, for otherwise a dissatisfied stockholder may by judicial proceedings nullify such an amendment.<sup>23</sup>

**§ 255. Liabilities of Stockholders—Failure to File Proper Certificates or Publish Notices.**

At common law stockholders are not individually liable for corporate debts, if their stock is fully paid up.<sup>24</sup> But under statutes which are quite common throughout the United States, making the stockholders of a corporation individually liable to the corporation and to its creditors to the amount of stock held by them, respectively, for all its debts and contracts, until the amount of its capital shall have been paid in and a certificate therefor made and recorded, a stockholder is liable, where such certificate has not been made and recorded, even if all the capital has been fully paid.<sup>25</sup>

**§ 256. Corporation Organized for Illegal Object.**

Where the entire business carried on by persons in the name of a corporation is such as the corporation is prohibited by

<sup>23</sup> *Clearwater v. Meredith*, 68 U. S. (1 Wall.) 25, 17 L. Ed. 604; *Zabriskie v. Hackensack & N. Y. R. Co.*, 18 N. J. Eq. (3 C. E. Green) 178, 90 Am. Dec. 617; *Stickle v. Liberty Cycle Co.* (N. J. Ch.) 32 Atl. 708; *Stevens v. Rutland & B. R. Co.*, 29 Vt. (3 Williams) 545; *Baltimore & O. R. Co. v. City of Wheeling*, 54 Va. 40. See chapter XXIV, § 515.

<sup>24</sup> *Toner v. Fulkerson*, 125 Ind. 224, 25 N. E. 218.

<sup>25</sup> *Flash v. Conn.*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966; *Clegg v. Hamilton & Wright County Grange Co.*, 61 Iowa, 121, 15 N. W. 865; *Houts v. Sioux City Brass Works*, 134 Iowa, 484, 110 N. W. 166; *Robinson & Co. v. Harris*, 5 Ky. Law Rep. 928; *Eaton v. Aspinwall*, 13 N. Y. Super. Ct. (6 Duer) 176; *Chase v. Lord*, 6 Abb. N. C. (N. Y.) 258; *Paterson v. Arnold*, 45 Pa. (9 Wright) 410; *Congdon v. Winsor*, 17 R. I. 236, 21 Atl. 540; *Starkweather & Shepley v. Brown*, 25 R. I. 142, 55 Atl. 201, rehearing denied 25 R. I. 176, 55 Atl. 324. See section 615, Code of Law D. C. 1901.

law from doing, the persons conducting such business may be held liable as partners.<sup>26</sup>

### § 257. Liability for Assessment on Stock—Call by Corporation.

As between the corporation and its stockholders, the liability of the latter for assessments upon their capital stock is governed either by the laws of the state under which the corporation is created, or by the charter, by-laws, or resolutions of the company. Ordinarily speaking, when a stockholder has once paid in full for his stock, he is not liable for further assessments. If the corporation issues stock to him as fully paid and nonassessable, it cannot call upon him for any further payments thereupon.<sup>27</sup>

### § 258. Liability to Creditors.

Questions relating to the liability of stockholders generally arise in actions by or on behalf of creditors. In such a case, although the corporation may be estopped by its contract from asserting any claim against the stockholder, a creditor is not so estopped. If, as a matter of fact or of law, the stock has not been fully paid, the stockholder to whom the corporation issued it may be held liable for the difference between the amount paid and the par value of the stock.<sup>28</sup> Whether an

<sup>26</sup> *St. Louis Stamping Co. v. Quimby*, Fed. Cas. No. 12,240a; *Mead-er Furniture Co. v. Rowland*, 6 Ohio Dec. 595, 3 Wkly. Law Bul. 480; *Medill v. Collier*, 16 Ohio St. 599; *McGrew v. City Produce Exchange*, 85 Tenn. (1 Pickle) 572, 4 S. W. 38, 4 Am. St. Rep. 771.

<sup>27</sup> *Lancaster Starch Co. v. Moore*, 62 N. H. 671; *Atlantic De Laine Co. v. Mason*, 5 R. I. 463.

<sup>28</sup> *New Albany v. Burke*, 11 Wall. 96, 20 L. Ed. 155; *Burke v. Smith* (*Putnam v. New Albany S. C. J. R. Co.*) 16 Wall. (83 U. S.) 390, 21 L. Ed. 361; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Johnson v. Lafin*, 5 Dill. 65, Fed. Cas. No. 7,393; *Johnston v. Lafin*, 103 U. S. 800, 26 L. Ed. 532; *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct.

innocent purchaser of unpaid stock marked "full paid and nonassessable" is liable for further calls thereon at the instance of creditors does not seem to be settled by the decisions. The courts of New York, Illinois, California, and Nebraska apparently have held all purchasers liable, even though they have paid full value for the stock without notice of any claims

345, 28 L. Ed. 385; *Coit v. North Carolina Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Potts v. Wallace*, 146 U. S. 689, 13 Sup. Ct. 196, 36 L. Ed. 1135; *Old Dominion Copper Mining & Smelting Co. v. Lewisohn*, 210 U. S. 206, 28 Sup. Ct. 634, 52 L. Ed. 1025; *Jenkins v. Armour*, 6 Biss. 312, Fed. Cas. No. 7,260; *In re State Ins. Co. (C. C.)* 14 Fed. 28; *Glenn v. Scott (C. C.)* 28 Fed. 804; *Stewart v. St. Louis, Ft. S. & W. R. Co. (C. C.)* 41 Fed. 736; *Hall & Farley v. Alabama Terminal Improvement Co.*, 143 Ala. 464, 39 South. 285, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363; *United Society v. President, etc., of Eagle Bank of New Haven*, 7 Conn. 456; *Trustees of Bishop's Fund v. President, etc., of Eagle Bank of New Haven*, 7 Conn. 476; *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *Bradfield v. Washington Co-operative Drug Co.*, 40 Wash. Law Rep. (D. C.) 259; *Zirkel v. Joliet Opera House Co.*, 79 Ill. 334; *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551; *Coleman v. Howe*, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133; *Bruner v. Brown*, 139 Ind. 603, 38 N. E. 318; *Du Puy v. Transportation & Terminal Co.*, 82 Md. 408, 33 Atl. 889, 34 Atl. 910; *St. Louis Carriage Mfg. Co. v. Hilbert*, 24 Mo. App. 338; *Currier v. Lebanon Slate Co.*, 56 N. H. 262; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 62 Atl. 971, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637; *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 257; *In re Reciprocity Bank*, 22 N. Y. 9; *Braddock Electric R. Co. v. Bily*, 11 Pa. Super. Ct. 144; *Bedford R. Co. v. Bowser*, 48 Pa. 37; *Fuches v. Hamilton Tribune Printing & Publishing Co.*, 10 Ont. 497; *Lawes' Case*, 1 De G. M. & G. 421; *Bellerby v. Rowland & Marwood's Steamship Co.* (1902) 2 Ch. 14; *In re United Service Co.*, 5 Ch. App. 707; *Wright's Case*, L. R. 12 Eq. 331; *Thomas' Case*, L. R. 13 Eq. 437; *Snell's Case*, L. R. 5 Ch. App. 22; *Addison's Case*, L. R. 5 Ch. App. 294; *Zullueta's Claim*, L. R. 5 Ch. App. 444; *Teasdale's Case*, L. R. 9 Ch. App. 54; *Duke's Case*, L. R. 1 Ch. Div. 620; 1 *Morawetz, Priv. Corp.* § 306; 2 *Cook, Corp.* § 416; 1 *Cook, Corp.* § 46; 10 *Cyc.* 768, 709, 710.

against it.<sup>29</sup> The great weight of authority in the United States is the other way.<sup>30</sup> It does not follow, however, that an original subscriber to stock, who sells it to a *bona fide* purchaser, is thereby exonerated from liability. This depends upon the state statute.<sup>31</sup> In some places the subscriber ap-

<sup>29</sup> *Stoddard v. Decatur Cracker Co.*, 84 Ill. App. 374, judgment affirmed 184 Ill. 53, 56 N. E. 327; *Rogan v. Illinois Trust & Savings Bank*, 93 Ill. App. 39, overruling *Coleman v. Howe*, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133; *Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb. 750, 56 N. W. 616; *White-Corbin & Co. v. Jones*, 167 N. Y. 158, 60 N. E. 422; *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1; *Perkins v. Cowles*, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158.

<sup>30</sup> *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Foreman v. Bigelow*, Fed. Cas. No. 4,934, 4 Cliff. 508; *Rood v. Whorton* (C. C.) 67 Fed. 434; *Id.*, 74 Fed. 118, 20 C. C. A. 332; *In re Remington Automobile & Motor Co.*, 153 Fed. 345, 82 C. C. A. 421; *Anglo-Californian Bank v. Grangers' Bank of California*, 63 Cal. 359; *Cohen v. Gwynn*, 4 Md. Ch. 357; *Brant v. Ehlen*, 59 Md. 1; *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814; *Keystone Bridge Co. v. McCluney*, 8 Mo. App. 496, overruling *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411, Fed. Cas. No. 9,994; *Wintringham v. Rosenthal*, 25 Hun (N. Y.) 580; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *West Nashville Planing Mill Co. v. Nashville Savings Bank*, 86 Tenn. (2 Pickle) 252, 6 S. W. 340, 6 Am. St. Rep. 835; *Albitztigui v. Guadalupe y Caloo Mining Co.*, 92 Tenn. 598, 22 S. W. 739; 1 *Cook, Corp.* (Last Ed.) § 50, and cases cited.

<sup>31</sup> *Glenn v. Priest* (C. C.) 48 Fed. 19; *Priest v. Glenn*, 51 Fed. 400, 2 C. C. A. 305, 4 U. S. App. 478; *American Alkali Co. v. Campbell* (C. C.) 113 Fed. 398; *Campbell v. American Alkali Co.*, 125 Fed. 207, 61 C. C. A. 317; *Morris v. Glenn*, 87 Ala. 628, 7 South. 90; *People's Home Savings Bank v. Rauer*, 2 Cal. App. 445, 84 Pac. 329; *Louisiana Ins. Co. v. Gordon*, 8 La. 174; *Vicksburg, S. & T. R. Co. v. McKeen*, 14 La. Ann. 724; *McKim v. Glenn*, 66 Md. 479, 8 Atl. 130; *Hambleton v. Glenn*, 72 Md. 331, 20 Atl. 115; *Glenn v. Hunt*, 120 Mo. 330, 25 S. W. 181; *Commercial Nat. Bank of Omaha v. Gibson*, 37 Neb. 750, 56 N. W. 616; *Hood v. McNaughton*, 54 N. J. Law, 425, 24 Atl. 497; *Pittsburgh & C. R. Co. v. Clarke*, 29 Pa. (5 Casey) 146; *Rogers v. Toland*, 43 Pa. Super. Ct. 248; *Huegle v. Bean*, 43 Pa. Super. Ct. 352.

pears to be discharged by a transfer in good faith.<sup>32</sup> But the transfer must be in good faith, for no stockholder is permitted to escape liability by transferring his stock when the corporation is known to be in failing circumstances.<sup>33</sup> A person cannot, by taking stock in the name of his infant children, avoid a legal liability upon it.<sup>34</sup>

<sup>32</sup> *Burke v. Smith* (*Putnam v. New Albany R. Co.*), 16 Wall. (83 U. S.) 390, 21 L. Ed. 361; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Morris v. Dunbar*, 177 Fed. 159, 100 C. C. A. 621; *Billings v. Robinson*, 94 N. Y. 415; *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194; *West Philadelphia Canal Co. v. Innes*, 3 Whart. (Pa.) 198; *White v. Green* (Iowa) 70 N. W. 182; *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052; *Stewart v. Walla Walla Printing & Publishing Co.*, 1 Wash. 521, 20 Pac. 605; *Perkins v. Cowles*, 157 Cal. 625, 108 Pac. 711, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158; *Whitewater Tile & Pressed Brick Mfg. Co. v. Baker*, 142 Wis. 420, 125 N. W. 984.

<sup>33</sup> *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 82 N. E. 891; *Kent v. Same*, 230 Ill. 495, 82 N. E. 911; *Rider v. Morrison*, 54 Md. 429; *Efird v. Piedmont Land Imp. & Inv. Co.*, 55 S. C. 78, 32 S. E. 758, modified 55 S. C. 78, 32 S. E. 897.

<sup>34</sup> *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220.

## CHAPTER XIII

## STOCKHOLDERS' MEETINGS

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§ 259. **Where Held.**

Unless the business to be transacted at the meeting is of a merely formal character, stockholders' meetings should not be held outside of the charter state without express statutory permission. Certainly the initial meeting should never be held outside of the parent state, even if the statute of that state in terms authorizes it.<sup>1</sup>

§ 260. **Preparation For.**

Aside from giving notice of the meetings, the secretary usually has several important matters to attend to prior to the time set for any assembly of stockholders.

§ 261. **Closing Transfer Book.**

He should see that the transfer book is closed the number of days prior to the election which may be prescribed by the by-laws, and permit no transfer of stock within that period. The object of this is to enable him to make up the alphabetical

<sup>1</sup> See chapter XI, §§ 214-220.

list of stockholders commonly required to be posted in his office a certain number of days prior to the annual election.<sup>2</sup>

### § 262. Compiling Reports.

He should also remind the various officials from whom reports are expected that the time for making such reports is at hand, and furnish them with any data which they may desire from the records of the company.

### § 263. Access to Books, etc.

He should prepare himself to answer any and all questions which his forethought might suggest would be put to him at the meeting, and should have at hand, conveniently arranged for ready access, all books, documents, reports, etc., which may be called for.

### § 264. Call for Meeting.

Notice of meetings should always be given in the form required by law or by-laws, unless such notice is waived by all the stockholders, either in writing or by their attendance, without objection, in person or by proxy.<sup>3</sup> If the meeting is a special one, the call should specify the time and place as well as the business to be transacted thereat, and no business other than that specified in the call can legally be performed at such a meeting.<sup>4</sup> Whether the meeting be regular or special, then,

<sup>2</sup> 2 Cook, Corp. § 538, and cases cited.

<sup>3</sup> Stow v. Wyse, 7 Conn. 214, 18 Am. Dec. 99; Stockholders of Shelby R. Co. v. Louisville, C. & L. R. Co., 75 Ky. (12 Bush) 62. See chapter XI, §§ 224-230.

<sup>4</sup> Evans v. Osgood, 18 Me. (6 Shep.) 213; People's Mut. Ins. Co. v. Westcott, 80 Mass. (14 Gray) 440; American Tube Works v. Boston Mach. Co., 139 Mass. 5, 29 N. E. 63; Beecher v. Marquette & Pacific Rolling Mill Co., 45 Mich. 103, 7 N. W. 695; Schwarzwald v. Tegen, 58 N. J. Eq. 319, 326, 43 Atl. 587; 1 Morawetz, Priv. Corp. § 482; 10 Cyc. 323-325.

though notice is not *required* in the case of a *regular* meeting, the secretary will be wise if he sends to each person entitled a communication calling attention to the date, time, and place thereof, because by so doing he jogs the memory of many who would otherwise forget.<sup>5</sup>

### § 265. Minutes.

It has become quite general to write up the minutes of the first meeting of incorporators in advance, for the reason that there are always certain formal matters to be passed upon which are as a rule entirely understood and agreed upon before the meeting is called. By so doing nothing is apt to be forgotten. The proper record of the proceedings of every corporation is of the utmost importance, for the business done is apt to slip from the memories of those in attendance, and the minutes are the only means by which a permanent record may be kept. They are competent evidence, in suits between stockholders, to show the acts of the corporation.<sup>6</sup> They should be clear and explicit. There is no necessity for them to recite any of the arguments in favor of or against a certain proposition. All that is required is that the action finally

<sup>5</sup> *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174; *Warner v. Mower*, 11 Vt. 385.

<sup>6</sup> *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 South. 405; *Bradford v. National Benefit Ass'n*, 26 App. D. C. 268; *National Council, Junior Order United American Mechanics of the United States v. State Council of the District of Columbia, Junior Order United American Mechanics*, 27 App. D. C. 1; *White Chimney & S. C. Turnpike Road Co. v. McMahan* (Ky.) 50 S. W. 836; *Brackett v. Persons Unknown*, 53 Me. 228; *Harrison v. Morton*, 83 Md. 456, 35 Atl. 99; *Heintzelman v. Druids' Relief Ass'n*, 38 Minn. 138, 36 N. W. 100; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Abernathy v. Society of Church of Puritans*, 3 Daly (N. Y.) 1; *Blake v. Griswold*, 103 N. Y. 429, 9 N. E. 434; *Bedford R. Co. v. Bowser*, 48 Pa. 29; *Dennis v. Joslin Mfg. Co.*, 19 R. I. 666, 36 Atl. 129, 61 Am. St. Rep. 805.

taken should appear, although, when it is believed that the exact position of any stockholder on a certain question may thereafter be disputed, it is sometimes found expedient to incorporate in the minutes an epitome of his remarks upon this question. Then, too, it is better, if a stockholder taking part in a discussion desires that a memorandum of his views should be spread upon the minutes, that his wishes in this respect be complied with. In certain cases this may be demanded as a matter of right.<sup>7</sup>

#### § 266. Minute Book.

The minutes should be kept in a book firmly bound. As a matter of convenience it is well to copy the charter in full on the first page of the minute book, followed by the by-laws, sufficient space being then left in the book to subsequently insert any amendments to the by-laws which may afterwards be adopted. Then should follow the minutes of the first meeting of the incorporators and subscribers to the stock, to which should be appended copies of such papers as may be ordered spread upon the record.

#### § 267. Signature to Minutes.

When completed the minutes should, of course, be signed by the secretary. Sometimes it is considered better to have the president sign also, as an additional guaranty of their accuracy.

#### § 268. Reading the Minutes.

At the initial meeting of the incorporators there will, of course, be no minutes which could be read. But at every subsequent meeting a detail of very practical value will consist of

<sup>7</sup> General Corporation Law N. J. (P. L. 1896, p. 286) § 30, as amended by P. L. 1904, p. 275.

the reading of the minutes of the previous meeting, something which is not essential from a legal standpoint, but of importance as calling to the minds of the stockholders the condition of the business at the time such meeting was concluded, and to remind them of such unfinished matters as should properly be considered at the meeting then in session. It is not customary at special meetings to read the minutes of the preceding regular meeting, but there is no objection to doing this. At an adjourned meeting, also, the minutes of the prior meeting may profitably be read. After the minutes have been read, they should be either approved or ordered amended in such places as those assembled may decide them to be inaccurate. The secretary should notice every such inaccuracy, and correct it in the margin of the minutes, with a reference to the motion or resolution by which the correction was authorized.

#### § 269. **Order of Business.**

The order of business at regular meetings will usually be as follows:

1. Election of temporary officers, if this is not provided for in the by-laws.
2. Roll call.
3. Reading and disposition of previous unapproved minutes.
4. Annual reports of officers and committees.
5. Election of directors.
6. Unfinished business.
7. New business.
8. Adjournment.

#### § 270. **Chairman.**

Some person interested in the corporation assumes the chair, and calls for nominations for the office of chairman of the meeting. A chairman having been elected, a secretary is next elected.

## § 271. Reading of Notice, etc.

If the meeting has been convened upon formal call, the call is then read; if pursuant to waivers such as have been presented in the preceding chapter, the waivers are then read and ordered spread on the minutes. It is not *necessary* that these waivers should be spread upon the minutes, but by so doing a permanent record is kept of them, which may be found convenient for future use.

## § 272. Roll Call.

The roll will then be called to ascertain how many of the incorporators and subscribers to the stock are present, and a memorandum made by the secretary showing who are present in person and who by proxy. At the time the roll is called the person holding a proxy for the one whose name is mentioned will answer to it and file with the secretary the proxy; or, if preferred, such proxy may have been filed with the secretary in advance of the meeting. If the number of persons in attendance is small, instead of calling the roll the secretary might call upon each person present to present and file with him whatever proxies he holds, thus saving time in this way.

## § 273. Acceptance of Charter.

If the corporation has received a special charter from the legislature, such charter should then be read, and formally accepted by the incorporators.<sup>8</sup> If the corporation has been formed pursuant to a general law, it is usual, but not necessary, at this stage of the proceedings, to make mention of the

<sup>8</sup> *Atkinson v. Tennill*, 14 Ky. Law Rep. 922; *President, etc., of Lincoln & Kennebec Bank v. Richardson*, 1 Me. (1 Greenl.) 79, 10 Am. Dec. 34; *State to Use of Washington County v. Baltimore & O. R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 319; *Smith v. Silver Valley Min. Co.*, 64 Md. 85, 20 Atl. 1032, 54 Am. Rep. 760; *Ellis v. Marshall*, 2 Mass. 269, 3 Am. Dec. 49; *Lycoming Fire Co. v. Buck*, 1 Luz. Leg. Reg. (Pa.) 351; *Commonwealth v. Conover*, 30 Leg. Int. (Pa.) 200; *Haslett's Ex'rs v. Wotherspoon*, 1 Strob. Eq. (S. C.) 209; 1 *Clark & M. Corp.* § 44; 1 *Cook, Corp.* § 2a; 10 *Cyc.* 203.

fact that the certificate of incorporation has been filed, stating the time and place of such filing, and the liber and folio of the record where the same can be found. If the charter contains the names of the directors for the first year, as is sometimes required by statute, it is also well to have a formal recognition of the appointment of such directors spread upon the minutes.

#### § 274. **Transfer of Subscriptions.**

If any of the subscriptions have been transferred, such transfers should be brought to the attention of the meeting by the secretary, and action taken recognizing them.

#### § 275. **Adoption of By-Laws.**

The next business in order is usually the adoption of by-laws. As a general rule the stockholders are the ones who make and change the by-laws. Sometimes that power is vested by the statute in either the directors or the stockholders, and sometimes in the directors alone. It is also quite a common practice in modern times to insert a provision in the by-laws enabling the directors to amend at will.<sup>9</sup> In determining whether by-laws should be adopted by the incorporators or by the directors, reference must be had to the statute of the state of incorporation.

§ 276. Assuming that the stockholders or incorporators are the ones upon whom this power devolves, the matter of by-laws should receive very careful consideration at this meeting. It is customary to read and act upon the proposed draft, section by section, so that full deliberation may be had in determining whether or not to adopt them. The matter of by-laws will be discussed at greater length in the following chapter.<sup>10</sup>

<sup>9</sup> Chapter XII, § 247; chapter X, § 173.

<sup>10</sup> Chapter XIV.

**§ 277. Annual Reports.**

Whether the reading of the annual reports of the directors and officers should precede or follow the election is a matter of choice. It would seem logical that these reports should be heard by the stockholders before they are called upon to determine who shall manage the affairs for the subsequent year. Sometimes it is deemed better policy, in order to avoid friction and insure greater stability of management, to have these reports read after the election has taken place.

**§ 278. Election of Directors.**

The election of directors is then usually proceeded with. If the directors for the first year are named in the charter in accordance with a statute, then of course such election would be superfluous. Otherwise they should be chosen at this meeting. If the legislature has prescribed no particular form in which the election should be conducted, it may be managed in the customary way. That is to say, some one nominates a board, and upon the nomination being seconded the vote is taken, the majority vote deciding. In practice there is generally no contest at the first meeting, inasmuch as the directors have usually been determined upon beforehand. Where the statute requires the election to be by ballot it is customary to instruct the secretary of the meeting to cast the ballot for the persons nominated, a procedure which may be had by unanimous consent.<sup>11</sup>

**§ 279. Who may Vote.**

The qualifications of voters are usually determined by the statute, or else by the charter or by-laws of the particular corporation. When these qualifications are definitely prescribed by statute, the corporation cannot extend or limit the

<sup>11</sup> *Wardens of Christ Church v. Pope*, 8 Gray (Mass.) 140; 2 Cook, Corp. § 605.

right to vote.<sup>12</sup> Usually each stockholder may cast one vote for each share of stock held by him.<sup>13</sup> Sometimes bondholders also are given the right to vote.<sup>14</sup> Occasionally the right to vote is withheld from certain classes of stockholders;<sup>15</sup> and in other cases the right is restricted to a given maximum number of shares. In the latter event no stockholder may transfer shares without consideration, taking from the transferees powers of attorney securing to the transferors all control over the stock so assigned, with the right to vote same at their discretion.<sup>16</sup> Persons holding stock as trustees are entitled to vote such stock;<sup>17</sup> so, also, is an administrator or executor, even without a formal transfer into his name from the name of his decedent.<sup>18</sup> But, where stock is transferred to trustees for the use of the corporation, such stock cannot be voted;<sup>19</sup> nor can unissued stock held by the corporation in its

<sup>12</sup> *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *Walker v. Johnson*, 17 App. D. C. 144; *Beckett v. Houston*, 32 Ind. 393; *Wilson v. American Academy of Music*, 2 Pa. Co. Ct. R. 280.

<sup>13</sup> *Proctor Coal Co. v. Finley*, 98 Ky. 405, 33 S. W. 188; *State v. New Orleans, J. & G. N. R. Co.*, 20 La. Ann. 489.

<sup>14</sup> General Corporation Law Del. (Rev. 1911) § 29; General Incorporation Act Va. (Laws 1902-04, c. 270, subc. 5) § 29 (1 Code Va. 1904, § 1105e, subd. 29); Nevada General Incorporation Law (Laws 1903, c. 88) § 11.

<sup>15</sup> *State ex rel. Frank v. Swanger*, 190 Mo. 561, 89 S. W. 872, 2 L. R. A. (N. S.) 121, 4 Ann. Cas. 563.

<sup>16</sup> *Campbell v. Poultney*, 6 Gill & J. (Md.) 94, 26 Am. Dec. 559; *Commonwealth v. Detwiller*, 131 Pa. 614, 18 Atl. 990, 992, 7 L. R. A. 357, 360.

<sup>17</sup> *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Conant v. Millaudon*, 5 La. Ann. 542; *In re Barker*, 6 Wend. (N. Y.) 509; *Wilson v. Proprietors of Central Bridge*, 9 R. I. 590.

<sup>18</sup> *Market St. Ry. Co. v. Hellman*, 109 Cal. 571, 42 Pac. 225; *Election of Directors of Cape May & Delaware Bay Nav. Co.*, 51 N. J. Law (22 Vroom) 78, 16 Atl. 191; *In re North Shore Staten Island Ferry Co.*, 63 Barb. (N. Y.) 556.

<sup>19</sup> *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237; *American*

own name be voted.<sup>20</sup> The pledgor of shares hypothecated may vote them until he has forfeited his right to the stock.<sup>21</sup> It is not necessary that the stockholder should have paid for his stock in full in order that he may be entitled to vote thereon.<sup>22</sup>

### § 280. Manner of Voting.

This is generally specified in the by-laws. A vote may be taken either *viva voce* or by ballot. A stock vote may be had on all propositions, or only on certain specified subjects. As a rule the stock vote is confined to elections; but, in the absence of some valid rule to the contrary, a stockholder may insist upon a stock vote upon other questions.<sup>23</sup>

### § 281. Cumulative Voting.

This is a method of voting which may not be resorted to unless the statute of the parent state or the charter of the com-

Railway-Frog Co. v Haven, 101 Mass. 398, 3 Am. Rep. 377; *Ex parte* Holmes, 5 Cow. (N. Y.) 426.

<sup>20</sup> United States v. Columbian Ins. Co., Fed. Cas. No. 14,840, 2 Cranch, C. C. 266; *State ex rel. Page v. Smith*, 48 Vt. 266. *Contra*: Allen v. De Lagerberger (Super. Ct. Cin.) 20 Wkly. Law Bul. 368, 10 Ohio Dec. 341.

<sup>21</sup> Scholfield v. Union Bank, Fed. Cas. No. 12,475, 2 Cranch, C. C. 115; Vowell v. Thompson, Fed. Cas. No. 17,023, 3 Cranch, C. C. 428; Miller v. Murray, 17 Colo. 408, 30 Pac. 46; *Ex parte* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; Allen v. De Lagerberger (Super. Ct. Cin.) 20 Wkly. Law Bul. 368, 10 Ohio Dec. 341; *State v. Smith*, 15 Or. 98, 14 Pac. 814, 15 Pac. 137, 386; *Commonwealth v. Dalzell*, 152 Pa. 217, 25 Atl. 535, 34 Am. St. Rep. 640.

<sup>22</sup> Price v. Holcomb, 89 Iowa, 123, 56 N. W. 407; Haskell v. Read, 68 Neb. 107, 93 N. W. 997, 96 N. W. 1007; *Downing v. Potts*, 23 N. J. Law (3 Zab.) 66; *Henderson v. Hogan*, 1 Wkly. Law Bul. 227, 7 Ohio Dec. 173.

<sup>23</sup> Proctor Coal Co. v. Finley, 98 Ky. 405, 33 S. W. 188; *In re* Rochester Dist. Telegraph Co., 40 Hun (N. Y.) 172.

pany permits it.<sup>24</sup> It is a device by which, when permitted, the minority may always secure and keep a representation on the board of directors. When this right exists, a stockholder may cast as many votes as shall equal the number of shares owned by him, multiplied by the number of directors to be elected. He may cast all these votes for a single director, or a certain number for one director and a less number for another, or divide them evenly among the entire number of directors to be elected, at his option. By this means the minority stockholders may sometimes elect a majority of the board of directors, should the majority not be watchful to prevent this. To illustrate, we will suppose a corporation having outstanding 10,000 shares of stock. Five directors are to be elected. The majority interest holds 6,000 shares. They distribute their votes evenly among their five candidates, giving each 6,000 votes. The holders of the other 4,000 shares distribute their votes among three directors nominated by them, thus giving to each director  $6,666\frac{2}{3}$  votes, in this way securing control of the board.

### § 282. Proxies.

At common law, voting by proxy was not permitted.<sup>25</sup> In this country legislation has generally changed this practice. The usual proxy, being intended for the ordinary corporate purposes merely, does not authorize a vote to dissolve the corporation, or to sell the entire corporate assets, or a vote upon other important business outside of the ordinary functions of

<sup>24</sup> *State ex rel. Dent v. Halloway*, 1 Ohio Cir. Ct. R. 157, 1 O. C. D. 90; *State v. Stockley*, 45 Ohio St. 304, 13 N. E. 279; *Dick v. Lehigh Val. R. Co.* (Com. Pl.) 4 Pa. Dist. R. 56; *Hays v. Commonwealth ex rel. McCutcheon*, 82 Pa. 518; *Appeal of Baker*, 109 Pa. 461. See chapter X, § 176.

<sup>25</sup> *Taylor v. Griswold*, 14 N. J. Law, 222, 27 Am. Dec. 33; *Phillips v. Wickham*, 1 Paige (N. Y.) 590; *People v. Twaddell*, 18 Hun (N. Y.) 427; *Brown v. Commonwealth*, 3 Grant Cas. (Pa.) 209; *Craig v. First Presbyterian Church of Pittsburgh*, 88 Pa. 42, 32 Am. Rep. 417; *Commonwealth ex rel. Verree v. Bringham*, 103 Pa. 134, 49 Am. Rep. 119. See chapter XI, § 238.

a going corporation, unless the proxy itself, in general or special terms, confers the right to vote upon such questions.<sup>26</sup> A mere proxy is always revocable, no matter how strongly it may be expressed to be irrevocable.<sup>27</sup> Statutes sometimes restrict the limit of a proxy to a short term. Where that is the case, even though not revoked, it cannot be voted after the term specified in the statute has expired.<sup>28</sup>

### § 283. Distinction between Proxy and Power of Attorney.

A distinction not always noticed exists between a proxy and a power of attorney. The distinction is important in corporations whose by-laws prevent voting by proxy unless the proxy is dated a certain number of days before the meeting. Let us suppose the case of three joint executors. It is desired to have one of them only attend the meeting, and a power of attorney is given by all to that one to vote on behalf of all the shares of stock held by the estate. The inspectors of election would have no right to refuse to permit this vote to be cast. The power of attorney in such case would not be a proxy. As was said by the Court of Appeals of the District of Columbia, when stock is held jointly by executors, administrators, trustees, or other persons acting in a fiduciary capacity, they have the right to designate one of their number to represent the interest held by them at corporate meetings, inasmuch as the corporation is entitled to refuse recognition to more than one person to represent any one interest. "Indeed, the only way in which stock held jointly can be voted is by authority from

<sup>26</sup> *Farish v. Cieneguita Copper Co.*, 12 Ariz. 235, 100 Pac. 781; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Smith v. Smith*, 3 Desaus. (S. C.) 557; 2 Cook, Corp. § 610, and cases cited.

<sup>27</sup> *In re Election of Directors of Germicide Co. of New York*, 65 Hun, 606, 20 N. Y. Supp. 495; *Griffith v. Jewett* (Super. Ct. Cin.) 15 Wkly. Law Bul. 419, 9 Ohio Dec. 627; 2 Cook, Corp. § 610, and notes.

<sup>28</sup> Delaware General Corporation Law 1899 (21 Del. Laws, p. 450) § 17, as amended (22 Del. Laws, p. 262).

all of them to one of their number.”<sup>29</sup> So, too, where a corporation or a partnership owns stock, such stock may be voted by an individual agent or partner.<sup>30</sup> The instrument attesting his right to vote the stock is not a proxy, within the meaning of the by-law above referred to.

### § 284. Form of Power of Attorney.

Below is inserted a form of a power of attorney given by a corporation authorizing some one to vote stock held by it in another corporation. It may be changed as circumstances demand.

### § 285.

Whereas, the ..... Company is the owner of certain shares of the capital stock of the Acme Manufacturing Company, and is entitled to vote said stock at all meetings of said last-named company;

Now, therefore, know all men by these presents that ..... be and he is hereby constituted and appointed the true and lawful attorney of the ..... Company to attend any and all meetings of said Acme Manufacturing Company until his authority so to do shall be revoked, with full power and authority to vote in the name and on behalf of the ..... Company upon all shares of stock which may be owned by it at the time this power of attorney may be presented, and to perform any and every act on behalf of the ..... Company which any stockholder of said Acme Manufacturing Company may perform. And said attorney is hereby granted for the purposes aforesaid all and every power belonging to the ..... Company as a stockholder in said Acme Manufacturing Company. And whatsoever said attorney may do at any meeting of said Acme Manufacturing Company in the name of and on behalf of the ..... Company is hereby ratified and affirmed.

In witness whereof, the ..... Company has executed the foregoing power of attorney in its corporate name and affixed hereto its corporate seal this ..... day of ....., A. D. 19..

..... Company,  
By ..... President.  
[Corporate Seal]  
Attest: ..... Secretary.

<sup>29</sup> Scanlan v Snow, 2 App. D. C. 154.

<sup>30</sup> State v. Rohlfes (N. J. Sup. 1890) 19 Atl. 1099.

### § 286. Inspectors of Election.

Where the election is contested, and inspectors are appointed to receive and count the ballots, the manner of proceeding is somewhat more complicated than when there is no contest, and some rather interesting questions of law may arise. In the absence of some custom or law to the contrary, the inspectors are elected by those present at the meeting.<sup>31</sup> There is no law requiring an inspector to be a stockholder. Indeed, it has been said that it is better to select an outside person for this office.<sup>32</sup> For manifest reasons it is better that the inspectors should not themselves be candidates, although it has been held in New York that this will not disqualify them.<sup>33</sup> Some statutes, recognizing the evil of inspectors being candidates, forbid this, although sometimes exceptions are made in favor of the first meeting.<sup>34</sup>

### § 287. Swearing Inspectors.

It is frequently required by statute that the inspectors shall be sworn before entering upon the duties of their office.<sup>35</sup> The following form of oath complies with the usual requirements:

### § 288. Inspectors' Oath.

State of..... }  
County of..... } ss.:

The undersigned, duly appointed to act as inspectors of election at the meeting of the stockholders of the ..... Company, a

<sup>31</sup> State ex rel. Attorney General v. Merchant, 37 Ohio St. 251; 2 Cook, Corp. § 605.

<sup>32</sup> Stebbins v. Merritt, 10 Cush. (Mass.) 27; People v. Albany & S. R. Co., 55 Barb. (N. Y.) 344; Dickson v. McMurray, 28 Grant, Ch. (Can.) 533.

<sup>33</sup> Ex parte Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525.

<sup>34</sup> Civ. Code Porto Rico 1902, tit. 2, c. 1, § 48; General Corporation Law N. J. (2 Comp. St. 1910, p. 1622) § 35.

<sup>35</sup> In re Mohawk & H. R. Co., 19 Wend. (N. Y.) 135; In re Wheeler, 2 Abb. Prac. N. S. (N. Y.) 361.

corporation created under the laws of the state of ....., held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., being severally duly sworn upon their respective oaths, do undertake, promise, and swear, and each for himself does undertake, promise and swear that they and he will faithfully, honestly, and impartially perform the duties of inspectors and inspector of election for directors of said company to be held on said date, to the best of their and his ability, and make a true report of the results of said election. ....

Severally subscribed and sworn to before me this ..... day of ....., A. D. 19..

[Notarial Seal.]

....., Notary Public.

### § 289. Counting Ballots.

After qualifying, the inspectors take charge of the election, receiving the ballots and counting them. Their powers are merely ministerial. If a vote is challenged the only evidence they may receive upon the question of the right of the party offering the vote to cast it is the books of the company, the stock transfer books controlling.<sup>36</sup>

### § 290. Powers of Inspectors.

Inspectors of election have no power to pass upon the validity of proxies apparently regular upon their face.<sup>37</sup> They have no right to require a proxy to be acknowledged or proven by a subscribing witness, unless the statute or by-laws require it,<sup>37</sup> nor can the inspectors pass upon the qualifications of a candidate for election; and votes cast for an ineligible candidate will not be discarded so as to result in the election of one having a minority of the votes, unless it is made to appear that those voting knew of the ineligibility of the candidate for

<sup>36</sup> *Downing v. Potts*, 23 N. J. Law, 66; *In re Election of Directors of St. Lawrence Steamboat Co.*, 44 N. J. Law, 529; *People v. Kip*, 4 Cow. (N. Y.) 382, note; *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37, 32 Am. Dec. 429.

<sup>37</sup> *In re Election of Directors of St. Lawrence Steamboat Co.*, 44 N. J. Law, 529; *In re Cecil*, 36 How. Prac. (N. Y.) 477.

whom they voted.<sup>38</sup> But the stockholders should be careful not to nominate candidates who would be ineligible; and in considering this they should ascertain whether candidates proposed have the requisite capacity with regard to residence, stock ownership, etc., to hold the office for which they are nominated; otherwise the courts may declare the election invalid.

### § 291. Inspectors' Report.

After the votes have been counted and the result ascertained the inspectors make their report to the meeting, which may be in the following form:

### § 292. Form of Inspectors' Certificate.

The undersigned, the inspectors duly appointed to conduct the election for directors of the ..... Company, a corporation created under the laws of the state of ....., do hereby certify and report that at a meeting of the stockholders of said company held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the .....noon, a quorum being present, after the undersigned had been first duly sworn by the form of oath filed herewith to impartially conduct said election, we did hold and conduct the election aforesaid, and did receive the ballots of the persons entitled to vote thereat; that the total number of votes cast was.....; and that the result of the vote taken thereat was the election by the vote set opposite their respective names herein of the following directors to serve for the ensuing year:

Name.	Votes Received.
John Doe.....	.....
Richard Roe.....	.....
William Blackstone.....	.....
etc.	etc.

In testimony whereof we have hereunto set our names and affixed our seals this ..... day of ....., A. D. 19...

....., [Seal.]

....., [Seal.]

Inspectors.

<sup>38</sup> Schmidt v. Mitchell, 101 Ky. 570, 41 S. W. 929, 19 Ky. Law Rep. 763, 72 Am. St. Rep. 427; In re Election of Directors of St.

§ 293. **Notary's Certificate.**

If it is desired to have the report authenticated, the following form of notary's certificate is sometimes used:

§ 294. **Form of Notary's Certificate.**

State of..... }  
County of..... } ss.:

On the ..... day of ....., A. D. 19.., before me personally came (fill in names of inspectors), to me known to be the persons who executed the foregoing certificate, and severally acknowledged that they executed the same for the purposes therein set forth.

.....,

[Notarial Seal.]

Notary Public.

§ 295. **Filing Certificate.**

In the state of New York both the inspectors' oath and certificate must be afterwards filed in the office of the clerk of the county in which the election is held.<sup>39</sup> Wherever this is not required, these documents should be retained by the secretary of the company for use whenever desired.

§ 296. **Election of Officers.**

The subordinate officers of the corporation are generally elected by the directors.<sup>40</sup> But occasionally provision is made for the election of these officers or some of them by the stockholders. It is not at all infrequent to have the stockholders elect the president of the corporation.<sup>41</sup> In case such election

Lawrence Steamboat Co., 44 N. J. Law, 529; Stratford v. Mallory, 70 N. J. Law, 294, 58 Atl. 347.

<sup>39</sup> General Corporation Law N. Y. (Consol. Laws 1909, c. 23) §§ 26, 31.

<sup>40</sup> Batchelor v. Planters' Nat. Bank of Louisville, 78 Ky. 435; Granger v. American Brewing Co., 25 Misc. Rep. 302, 54 N. Y. Supp. 590; Dill, N. J. Corp. p. 5.

<sup>41</sup> Virginia Corp. Act (Laws 1902-04, c. 270, subc. 5) § 10 (1 Code Va. 1904, § 1105e, subd. 10).

is to be conducted at a stockholders' meeting, in regular order, it would now take place, being managed in much the same way as the election of directors was held.

### § 297. Authority to Directors to Assess Stock.

When the understanding is that stock is to be paid for in installments, it is usual at the first meeting of incorporators to give to the board of directors power to assess the stock up to the full amount, payable as and when called for by the board.

### § 298. Transfer of Property.

In order for a new corporation to commence business, some way must be found to place in its possession the requisite funds and property. This may be accomplished by a cash subscription and payment. But more frequently a large portion of the corporation's resources will consist of property transferred to it by some individual or by another corporation. Naturally at the first meeting of the incorporators whatever proposition for such transfer may be under consideration would be presented. Directors are usually the ones to determine whether to accept or reject the offer,<sup>42</sup> Nevertheless the directors will generally prefer to take the views of the stockholders upon matters of such importance. Hence the practice of having the incorporators take action at the first meeting, so as to give the directors the benefit of their judgment.

### § 299. Stockholders' Resolutions Regarding Transfer.

It is customary, therefore, at this meeting to present a formal proposition from the owner of the property which it is desired to acquire, offering the same to the corporation at a figure named, to be paid for in full-paid and nonassessable stock. The incorporators then pass a resolution reciting that

<sup>42</sup> *In re La Solidarite Mut. Ben. Ass'n*, 68 Cal. 392, 9 Pac. 453; *McCullough v. Moss*, 5 Denio (N. Y.) 567.

such property is necessary to the conduct of the business of the company and that the same is of the value named, and authorizing the directors in their discretion to make the purchase under the terms of the proposition and issue stock in payment to the vendor and his nominees. It is a common practice, also, in cases where there is to be no cash actually paid in by the incorporators under their subscription agreement, to have the proposition recite an agreement between the proposer and the incorporators by which the stock to be issued to him or to his order is to include the subscribers' stock. If such an arrangement is acquiesced in by the subscribers to the original agreement, this estops them from claiming their stock, and is a protection to the company in not issuing to them what they would otherwise be entitled to receive. The company should be careful, however, not to issue all the stock to one person or corporation, because there should always be a sufficient number of stockholders in the corporation to preserve its corporate existence under the laws.

#### **§ 300. Authority to Issue Stock to Incorporators.**

If the proposition above adverted to does not include the incorporators' stock, then authority is generally specifically conferred upon the board by the stockholders to issue the shares subscribed for by the incorporators when the same shall have been fully paid.

#### **§ 301. Donating Stock Back to Treasury.**

It is a principle of corporation law which will be hereinafter discussed <sup>43</sup> that, unless there is some statute authorizing the issue of stock for less than par, it cannot as an original proposition be issued for less than its face value. But experience demonstrates that stock can be more readily sold if some concession is made in the way of an abatement from the par value. This has caused promoters to endeavor to find some method

<sup>43</sup> See chapter XIX, § 399.

by which stock can be issued under par and be legally fully paid and nonassessable. If stock has once been paid for in full, it may at common law subsequently be sold to a *bona fide* transferee under par without any liability on his part to pay more for it.<sup>44</sup> This, however, is prohibited by statute in New Hampshire.<sup>45</sup> The device frequently resorted to is to issue stock in return for property upon the assumption that the property is worth the full par value of the stock. The person thus receiving the stock may find it more beneficial to him to interest prominent capitalists in the company by assigning some of his stock to them than to hold it all himself. Consequently he may turn back into the treasury of the corporation such amount as may be desirable, to be held by it and reissued under the direction of its board of directors at such prices as they may fix. If the property originally transferred in return for the stock was really worth the par value of the stock, the subsequent surrender of the stock or a portion of it to the company would not affect the validity of such a reissue.<sup>46</sup> But the transaction itself invites suspicion, and should

<sup>44</sup> *Kelley v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099; *Divine v. Universal Sewing Machine Motor Attachment Co.* (Tenn. 1896), 38 S. W. 93; *Beckwith v. Galice Mines Co.*, 50 Or. 542, 93 Pac. 453, 16 L. R. A. (N. S.) 723; 1 *Cook, Corp.* § 313. See chapter XVIII, § 372; chapter XIX, § 399.

<sup>45</sup> *Kimball v. New England Roller Grate Co.*, 69 N. H. 485, 45 Atl. 253.

<sup>46</sup> *Rood v. Whorton* (C. C.) 67 Fed. 434, affirmed 74 Fed. 118, 20 C. C. A. 332; *Davis v. Montgomery Furnace & Chemical Co.*, 101 Ala. 127, 8 South. 496; *John R. Proctor Land Co. v. Cooke*, 103 Ky. 96, 44 S. W. 391; *Hey v. Dolphin*, 92 Hun, 230, 36 N. Y. Supp. 627; *Otter v. Brevoort Petroleum Co.*, 50 Barb. (N. Y.) 247; *People v. Albany & S. R.*, 55 Barb. (N. Y.) 344, 371; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Williams v. Taylor*, 120 N. Y. 244, 24 N. E. 288; *American Tube & Iron Co. v. Hays*, 165 Pa. 489, 30 Atl. 936; *Kelley v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099; *Manhattan Trust Co. of New York v. Seattle Coal & Iron Co.*, 19 Wash. 493, 53 Pac. 951; *Krisch v. Interstate Fisheries Co.*, 39 Wash. 381, 81 Pac. 855; 1 *Cook, Corp.* bottom p. 133.

not be indulged in unless those concerned are in a position to prove its good faith in every way.<sup>47</sup> If such a transaction is to take place, the resolution reciting the entire scheme is sometimes spread upon the records when the company is organized.

### § 302. Trustees to Hold Treasury Stock.

Should it be deemed necessary, in order to keep this treasury stock so turned back separate and apart from the unissued stock of the company, to place it in the names of trustees to hold subject to orders of the board of directors, the resolution above referred to should include the appointment of trustees to receive and hold the stock, and a statement of the terms upon which it is to be held by them.

### § 303. Authority to Issue Stock to Charter Limit.

In order that the directors may proceed at once with the project in hand, authority may be given them at this first meeting to issue, at their discretion, such stock as may be necessary, beyond the amount named in the charter as that with which the company is to commence business, up to the full amount permitted.

### § 304. Authority to Establish Office, etc.

The state legislatures have generally enacted laws requiring each corporation to open and maintain an office in the parent state, where the company's sign shall be displayed, certain corporate books kept, and an agent stationed, authorized to accept service on behalf of the corporation in any suits which may be filed against it. Sometimes statutes require the resolution authorizing this to be passed by the stockholders, and sometimes by the board of directors. It is an important matter, and should not be overlooked. A certified copy of this resolution should usually be filed with the proper official of the parent state.

<sup>47</sup> *Douglass v. Ireland*, 73 N. Y. 100.

**§ 305. Corporate Seal.**

This should preferably be approved by the stockholders at this meeting.<sup>48</sup>

**§ 306. Issue of Preferred Stock.**

The charter may not have provided for the issue of preferred stock, although it may be deemed expedient to create stock of this species. This is the occasion, therefore, when such issue should be authorized. Even though the statute is silent on the subject, it is perfectly legal for the stockholders at this first meeting to pass a resolution authorizing this class of stock. It is important that it should be done at this first meeting, however, for if any common stock is issued preferred stock cannot afterwards be issued without the unanimous consent of all the stockholders, unless the statute permits it.<sup>49</sup> The resolution providing for this class of stock should state very clearly the nature of the preferences, as to which more will be said in another chapter.<sup>50</sup>

**§ 307. Salaries to Officers.**

Although the question of salaries is usually committed to the board of directors for determination, it is a settled principle that the directors have no power to vote to themselves salaries as such.<sup>51</sup> If, therefore, these officers are to receive compensation in that capacity, the stockholders should vote it to them.

<sup>48</sup> *Stebbins v. Merritt*, 64 Mass. (10 Cush.) 27; *Cresman v. Hilltown & S. Turnpike Road Co.*, 15 Leg. Int. (Pa.) 77; *City Council of Charleston v. Moorhead*, 2 Rich. Law (S. C.) 430.

<sup>49</sup> 1 *Cook, Corp.* § 268, and notes; 2 *Clark & Mar. Corp.* § 415. See chapter XVIII, § 377.

<sup>50</sup> See chapter XVIII, §§ 374-380.

<sup>51</sup> *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523; *Gardner v. Butler*, 30 N. J. Eq. (3 Stew.) 702; *Blatchford v. Ross*, 37 How. Prac. (N. Y.) 110, 5 Abb. Prac. (N. S.) 434; *Marshall v. Industrial Federation of America*, 84 N. Y. Supp. 866, 14 N. Y. Ann. Cas. 100.

**§ 308. Directors as Officers.**

Corporations have frequently become involved in litigation because the directors, although not voting salaries to themselves as directors, have conferred upon themselves as officers a rate of compensation which was thought by some of the stockholders to be excessive and to smack of fraud. Because of this the managers of many corporations have found it a wise precaution to have a resolution passed at the stockholders' meeting fixing the salaries of the officers, where the directors are themselves to be such officers. It would be more difficult after such a resolution to claim with much prospect of success that the directors had acted fraudulently in this connection.<sup>52</sup>

**§ 309. Miscellaneous Matters.**

Such other miscellaneous matters of business as may properly come before the meeting may also be transacted.

**§ 310. Adjournment.**

The meeting should then formally adjourn, either sine die or to a day certain.

**§ 311. Form of Minutes of First Meeting of Incorporators and Subscribers.**

(To be varied to suit the circumstances of each case.)

The first meeting of the incorporators and subscribers to the capital stock of the ..... Company was held at ....., in the city of ..... on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the ....noon, pursuant to notice (or pursuant to the waivers appended hereto).

The meeting was called to order by Mr. ...., who asked for nominations for the office of chairman. Mr. .... was duly nominated and unanimously elected to this office. He having assumed the chair, nominations for secretary were called for, pur-

<sup>52</sup> *Davis v. Thomas & Davis Co.*, 63 N. J. Eq. 572, 52 Atl. 717. *McConnell v. Combination Min. & Mill. Co.*, 30 Mont. 239, 76 Pac. 194, 104 Am. St. Rep. 703, affirmed on rehearing 31 Mont. 563, 79 Pac. 248.

suant to which Mr. .... was nominated and unanimously elected to that position, and assumed the duties thereof.

The roll was then called, showing the following attendance:

*In Person.*

Name.....	Number of Shares.....
Name.....	do.
etc.	etc.

*By Proxy.*

Name.....	Name of Proxy.....	Number of Shares.....
Name.....	Name of Proxy.....	do.
etc.	etc.	etc.

The call (or waiver of notice) upon which the meeting was convened was then read and ordered spread upon the minutes, and is as follows:

(Insert call or waiver, as the case may be.)

A waiver of notice of assessment was also read, signed by the persons whose names appear in these minutes appended thereto, and ordered spread upon the minutes, and is in the words and figures following:

(Insert waiver.)

Mr. .... reported that the certificate of incorporation of the company had been filed in the office of (insert office of the proper state official where the certificate was filed), and had been there duly recorded in liber number ....., at page number ..... et seq., and presented a copy of the same, which was ordered spread upon the minutes.

(Note.—If the charter has been granted by a special act of the legislature, instead of the above entry a resolution should appear formally accepting such charter.)

Upon motion of Mr. ...., the directors named in said certificate were recognized as the directors of the company for the first year of its existence.

(Note.—In those states where the certificate of incorporation does not contain the names of the directors the above paragraph will, of course, be eliminated. In that event the paragraphs hereinafter inserted relating to the election of directors would appear at the place where the same appear in this form of minutes.)

Upon motion of Mr. ...., the following transfers of subscription were presented and ratified on behalf of the company:

Name of Original Subscriber.	Name of Transferee.	No. of Shares.
John Doe.	Richard Roe.	10
etc.	etc.	etc.
etc.	etc.	etc.

The secretary announced that a set of proposed by-laws had been drafted by counsel and was ready for consideration by the meeting; whereupon the same were read, section by section, and, after full discussion, the following by-laws were unanimously adopted to govern the affairs of the company:

(Insert the by-laws adopted, or make a note in the minutes referring to the page of the minute book where the by-laws can be found. Complete forms of by-laws will be found in §§ 319 and 319a of this book.)

The election of directors being next in order, the following gentlemen were elected (or appointed) inspectors of election, to wit: Messrs. .... and .... The oath of office was then administered to them, a copy of which is appended to these minutes.

(It is not always necessary that inspectors of election should be appointed. Consult the statutes with regard to this.)

The following persons were nominated by Mr. .... as directors to hold office for the first year of the company's existence, to wit: (Insert names of nominees.) No other nominations being made, the nominations were ordered closed. The polls were then opened, and remained open until all those desiring to vote had cast their ballots, after which the polls were declared closed, and the ballots were counted. The inspectors then presented their report, a copy of which is appended to these minutes. In accordance therewith the following gentlemen were declared duly elected directors of the company for the first year of its existence, to wit: (Insert the names of directors elected.)

(Note.—All reference to the election of directors will be omitted where they are designated for the first year in the charter. In this event the paragraph appearing above, showing the recognition by the stockholders of the directors named in the charter, will be proper.)

Mr. .... nominated the following officers to serve for the first year of the company's existence, to wit: (Insert names of nominees and the respective offices to which they were nominated.) No other nominations being made, the secretary was unanimously instructed to cast the ballot of the meeting for the gentlemen named, and they were declared duly elected to fill the said offices for the first year of the company's existence.

(Note.—Where the directors elect the officers, of course this item will not appear in the minutes of this meeting.)

On motion of Mr. .... the board of directors was authorized to assess the stock subscribed for up to the limit of the par value thereof, payable when and as called for by said board.

The secretary then read a proposition tendered by Mr. ...., offering to sell to the company certain property therein described in

exchange for one hundred thousand dollars of the capital stock of this company, to be issued to himself or his assigns, full paid and nonassessable, to include the stock subscribed for by the incorporators, offering also to donate to the treasury of the company twenty-five thousand dollars of such stock at par if the proposition should be accepted and the stock issued to him in accordance therewith.

After due consideration, the following preamble and resolutions were adopted upon motion of Mr. ....

Whereas, a proposition has been received from Mr. .... offering to sell, transfer, and assign to this company the following described property, to wit (insert description); said property to be paid for by full-paid and nonassessable stock of this company of the par value of one hundred thousand dollars, to be issued to Mr. .... or his assigns; offering also, in case of the acceptance of said proposition, to donate to the treasury of the company twenty-five thousand dollars of the stock to be issued in payment as aforesaid at par; and

Whereas, in the judgment of the stockholders and persons entitled to stock in this company, said proposition is fair and reasonable, and the value of the property offered is equal to that of the stock proposed to be issued in payment therefor, and such property is necessary to enable the company to properly conduct its affairs:

Therefore be it resolved that the board of directors be and they are hereby authorized and requested, if in their judgment it is proper so to do, to accept said proposition and purchase the property above mentioned upon the terms thereof, and to issue stock in payment in accordance therewith;

And be it further resolved that, in accordance with an agreement entered into between the individual incorporators of this company and the proposed vendor of said property, the stock to be issued in payment as aforesaid shall include the stock subscribed for by said incorporators, and said incorporators be released from all further obligation under their said subscriptions.

And be it further resolved that ..... and ..... be and they are hereby appointed trustees to receive and hold the twenty-five thousand dollars of stock to be donated to this company under the terms of said proposition, in accordance with the instructions which shall from time to time be given them by the board of directors.

On motion of Mr. ...., the directors were authorized to issue stock to the subscribers therefor upon receiving payment in full.

(Note.—This last item will not appear if the resolution inserted above is passed providing for the inclusion of the incorporators' shares in the stock to be issued to the vendor of the property therein referred to.)

Upon motion of Mr. ...., it was unanimously resolved that the board of directors be and they are hereby authorized from time to time, in their discretion, to issue capital stock of this company up to the full amount allowed by its charter, in such amounts as shall be lawfully fixed by said board, and to accept in full or in partial payment for said stock either cash or such property as the board may from time to time determine to be necessary to properly carry on the business of this company.

Upon motion of Mr. .... the following resolution was unanimously adopted:

Ordered: (1) That in compliance with the laws of the state of (insert name of parent state) the registered office of the company in said state be established and continuously maintained at (fill in street and number).

(2) That ..... be and is hereby appointed the agent of this company in charge of said office, upon whom process against this corporation may be served, with instructions and authority to keep in said office the stock transfer books, to register transfers therein, and to keep all other books and records of this company by law required to be kept therein, during the usual hours of business, open to examination by every stockholder and other person entitled to inspect the same.

(3) That the name of this corporation shall be at all times conspicuously displayed on a sign at the entrance to said office.

(4) That any stockholder of the company shall be entitled to a list of the names and addresses of the stockholders, with a statement of the number of shares held by each, upon prepayment to said agent of a reasonable fee to be fixed by him for making same.

The secretary was, on motion of Mr. ...., directed to send a copy of the foregoing resolutions, duly certified by him under the corporate seal, to said agent, and to file a copy thereof with such state officials as the law may designate.

(Note.—In offering the above resolutions the statutes of the parent state should be consulted so as to make sure that everything required by law is comprised in them.)

Upon motion of Mr. .... the design of corporate seal appended hereto was adopted as the corporate seal of this company.

On motion of Mr. .... the following resolution was unanimously adopted:

Resolved, that the capital stock of this company be divided into two classes, to be known respectively as common and preferred, the common stock to be issued to the par value of \$....., and the preferred stock to the par value of \$.....

(Note.—The proportion of preferred stock must never exceed the statutory limit.)

And be it further resolved, that the holders of preferred stock shall be entitled to receive out of the net earnings for each fiscal year, as and when declared by the board of directors, a noncumulative dividend at the rate of but never exceeding 6% per annum, payable quarterly, before any dividend shall be set apart or paid on the common stock for such year; and in case of liquidation or dissolution the holders of said stock shall be paid the par value of their preferred shares before any sum shall be paid to the holders of the common stock; and after the payment of the par value of the common stock to the holders thereof, any surplus, should there be such, is to be distributed ratably among all the shareholders, without preference.

(Note.—The above resolution will be varied to suit the particular terms of the preferences declared.)

And be it further resolved, that the forms of certificates of both common and preferred stock as appended to this resolution, and hereby ordered spread upon the minutes, be approved and adopted by the company.

On motion of Mr. ...., the following resolution was unanimously adopted:

Resolved, that the directors of this company be and they are hereby authorized to fix the salaries of the officers of this company at the following sums, to wit: (Insert the salaries fixed,) and that these salaries may be paid to the respective incumbents of said offices whether they are members of the board of directors or not.

The secretary was instructed to insert in the minute book, for purposes of reference, a copy of each of the following:

- (1) Copy of certificate of incorporation (copied at page .....).
- (2) Copy of by-laws (copied at page .....).
- (3) Waiver of notice of this meeting (copied at page .....).
- (4) Waiver of notice of assessment (copied at page .....).
- (5) Waiver of notice of increase of capital stock (copied at page .....).
- (6) Form of proxy signed by the absent incorporators and subscribers to the stock (copied at page .....).
- (7) Transfers of subscription (copied at page .....).
- (8) Oath and certificate of inspectors of election (copied at page .....).
- (9) Corporate seal (impressed upon page .....).
- (10) Forms of stock certificates (copied on page .....).

There being no further business, the meeting, on motion, adjourned.

.....

Secretary.

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## CHAPTER XIV

## BY-LAWS

- § 312. Skill in Preparation.
- 313. By Whom Passed.
- 314. Object.
- 315. Scope.
- 316. Classification of Subjects.
- 317. Amendment.
- 318. Drafting By-Laws.
- 319. Form of By-Laws.
- 319a. By-Laws of United States Steel Corporation.

## § 312. Skill in Preparation.

Much of the success in the practical workings of the company depends upon the foresight and skill displayed in the preparation of by-laws. The charter, as before stated, is the primary instrument to which resort must be had to determine the powers of a corporation;<sup>1</sup> but generally this merely outlines the machinery provided for its operations. It is to the by-laws that resort is generally had for specific guidance in these details.

## § 313. By Whom Passed.

By-laws are intended to define and limit the power of directors and officers,<sup>2</sup> and should therefore be passed by the stockholders,<sup>3</sup> although, as we have seen,<sup>4</sup> they sometimes contain within themselves the power to directors to alter or amend at their pleasure; and the legislation in a few states confers the power to make by-laws primarily upon the directors.

<sup>1</sup> See chapter III, §§ 36, 37.

<sup>2</sup> *Bornstein v. District Grand Lodge No. 4, Independent Order B'Nai B'rith* (1906) 2 Cal. App. 624, 84 Pac. 271.

<sup>3</sup> See chapter XII, Stockholders, § 247.

<sup>4</sup> *Manufacturers' Exhibition Bldg. Co. v. Landay*, 219 Ill. 168, 76 N. E. 146, reversed 121 Ill. App. 96. See chapter XIII, § 275.

**§ 314. Object.**

In preparing this document counsel generally has in mind either the advancement of the interests of the majority or the protection of the minority. The object of counsel in this particular will have much to do with the shape of the instrument as it comes from his office. The charter generally contains a statement of the broad powers and privileges of the corporation, leaving the routine details of procedure to the by-laws. By-laws are from their nature more of a temporary creation than is the charter, which is usually intended to define, during the period of corporate life, the scope of the company's powers; and whatever limitations upon these or upon the functions of the officers are contained in that instrument are usually intended to remain fixed during the whole term of the corporation's existence. Convenience will sometimes dictate that certain provisions of the statute law or of the charter should be inserted in the by-laws; not that these are thereby given any greater force, but that they are brought more prominently to the attention of the stockholders, and are more easily accessible to them. Statutes often prescribe certain privileges which may be exercised if a statement to this effect is incorporated in the by-laws, or that certain restrictions shall not apply if a provision to the contrary is inserted in this document.<sup>5</sup> Therefore this instrument should never be framed without an accurate knowledge of the statutes on the subject.

**§ 315. Scope.**

Most of the provisions regulating the internal management of the company may be inserted in the by-laws, provided they

<sup>5</sup> General Corporation Law Del. 1899, §§ 9, 29, General Corporation Law Va. § 10 (Laws 1902-04, c. 270, subc. 2, § 1*h*, and subchapter 5, § 2*h*; 1 Code Va. 1904, § 1105*b*, subd. 1*h* and § 1105*e*, subd. 2*h*). In a West Virginia corporation directors must be residents unless by-laws provide otherwise. General Corporation Law W. Va. (Code 1906, c. 53) § 49; Cross v. West Virginia Cent. & P. Ry. Co., 37 W. Va. 342; Smith v. Cornelius, 41 W. Va. 68.

are not inconsistent with the law of the state.<sup>6</sup> Where there is no charter requirement on the subject, the by-laws may confer the right to vote by proxy.<sup>7</sup>

### § 316. Classification of Subjects.

In preparing the by-laws a definite plan should be mapped out in the mind of the draftsman. It will be found convenient to divide them into eight parts, relating, in the order named, to the following subjects:

- (1) Stockholders;
- (2) Directors;
- (3) Executive committee (if there is one);
- (4) Officers;
- (5) Stock;
- (6) Financial management;
- (7) Miscellaneous provisions;
- (8) Amendments.

### § 317. Amendment.

By-laws may be amended from time to time in accordance with the wishes of the corporation; but they cannot be amended so as to impair any rights which have become vested by virtue of a previous by-law, even though the statute or charter may permit such amendments.<sup>8</sup> Nor can they be amended so as to contravene, repeal, or change the statutory or common law.<sup>9</sup> An amendment changing the nature of the busi-

<sup>6</sup> *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029; *Bornstein v. District Grand Lodge No. 4, Independent Order B'Nai B'rith*, 2 Cal. App. 624, 84 Pac. 271.

<sup>7</sup> *Walker v. Johnson*, 17 App. D. C. 144.

<sup>8</sup> *People ex rel. Pulford v. Fire Department of City of Detroit*, 31 Mich. 458; *Bergman v. St. Paul Mut. Building Ass'n*, 29 Minn. 275, 13 N. W. 120; *Grand Lodge, A. O. U. W., of Missouri v. Sater*, 44 Mo. App. 445; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159.

<sup>9</sup> *Wells v. Black*, 117 Cal. 157, 48 Pac. 1090, 59 Am. St. Rep. 162, 37 L. R. A. 619; *Herring v. Ruskin Co-op. Ass'n (Tenn. Ch.)* 52 S. W. 327; *Seneca County Bank v. Lamb*, 26 Barb. (N. Y.) 595; *Burden v. Burden*, 8 App. Div. 160, 40 N. Y. Supp. 499; *Katz v. H. & H. Mfg. Co.*, 183 N. Y. 578, 76 N. E. 1098.

ness of the corporation is invalid.<sup>10</sup> Whether they are amended by a majority vote or by a two-third's vote, the amendment should be in accordance with the provisions regulating this subject contained in the by-laws;<sup>11</sup> and when an amendment of vital importance, outside of the usual business to be transacted at an annual meeting, is desired, previous notice of the intention to pass such an amendment must be given.<sup>12</sup>

### § 318. Drafting By-Laws.

It is impossible to prepare a form of by-laws which will satisfactorily govern the affairs of every corporation. The environments differ so widely that a set which will prove most acceptable to one corporation may turn out to be a stumbling-block to another organized in the same state, to accomplish the same business, but governed by a different class of men. Appended hereto are two sets of by-laws at present in use, one by a New York corporation well known in the manufacturing and commercial world, and one by the United States Steel Corporation, a copy of whose charter has already been set forth in these pages.<sup>13</sup> It is believed that these by-laws can be easily modified to suit the needs of any corporation, and they are inserted verbatim, in preference to preparing forms which might not be so well fitted for actual business needs.

### § 319. Form of By-Laws.

#### ARTICLE I.

##### STOCKHOLDERS' MEETINGS.

Section 1. All meetings of the stockholders of this company shall be held at the principal office or place of business of the company in the state of New York.

Sec. 2. The annual meeting of the stockholders of this company

<sup>10</sup> Van Atten v. Modern Brotherhood of America, 131 Iowa, 232, 108 N. W. 313.

<sup>11</sup> Van Atten v. Modern Brotherhood of America, 131 Iowa, 232, 108 N. W. 313; Mutual Fire Ins. Co. v. Farquhar, 86 Md. 668, 39 Atl. 527.

<sup>12</sup> Bagley v. Reno Oil Co., 201 Pa. 78, 50 Atl. 760, 56 L. R. A. 184.

<sup>13</sup> See chapter X, § 191.

shall be held on the third Wednesday of October in each year, at which there shall be chosen nine persons, who shall be stockholders in said company, to be the directors of said company for the ensuing year. A notice of such meeting, either written or printed, or partly written and partly printed, shall be mailed ten days before such meeting to each stockholder, to his post-office address appearing upon the records of the company, in addition to notice required by law to be published.

Sec. 3. If, for any reason, the annual meeting of stockholders shall not be held as hereinbefore provided, such annual meeting shall be called by the president and directors as soon as conveniently may be. It shall be the duty of the secretary, on the written request of five stockholders, if the election for directors has not been held as hereinbefore provided, to call a meeting of the stockholders as provided in section 2 for the election of directors.

Sec. 4. Special meetings of the stockholders of this company may be called at any time by the president. It shall also be the duty of the president to call a special meeting of the stockholders, whenever requested in writing so to do, by stockholders owning ten per cent. of the entire capital stock. If the president on such request neglects for 24 hours to call a special meeting, then the stockholders making the request may call a special meeting. Notice of special meetings shall be given by mailing a notice thereof to each stockholder, to his post-office address appearing upon the records of the company, at least ten days before such meeting. Such notice, in addition to stating the time at which said meeting shall be held, shall briefly state the object of said meeting, and no business not so stated shall be considered at such meeting, except on the unanimous consent of all stockholders present, in person or by proxy, at such special meeting.

Sec. 5. No meetings of stockholders shall be called or held except as authorized by the law of the state of New York or these by-laws.

Sec. 6. At all stockholders' meetings, stockholders owning at least thirty per cent. of the capital stock of the company, and present in person or by proxy, shall be necessary to constitute a quorum.

#### VOTING.

Sec. 7. At all annual meetings of stockholders, the right of any stockholder to vote shall be governed and determined by the transfer records. Only such persons shall be entitled to vote who appear as stockholders upon the transfer records of the company.

Sec. 8. No share of stock shall be voted upon at any election which has been transferred on the records of the company within ten days next preceding such election.

Sec. 9. Stockholders may give proxies to vote at any meeting.

Sec. 10. At all meetings of stockholders all questions except the question of an amendment of these by-laws, and the question of the

election of directors, and all such other questions the decision of which is specially regulated by statute, shall be determined by a majority vote of the stockholders present in person or by proxy; and, in the event of a tie vote, the presiding officer of the meeting shall cast the deciding vote, provided that any stockholder present may demand a stock vote. When a stock vote is demanded it shall immediately be taken, and each stockholder present shall be entitled to one vote for each share of stock he owns, as appears by the transfer records as hereinbefore provided, and one vote for each share of stock so owned by any stockholder whose proxy he may be, and the question shall be decided affirmatively by a vote of not less than twenty-five per cent. of all outstanding shares of stock of said company.

All voting shall be viva voce, except that a stock vote and vote for the election of directors shall be by ballot, and each ballot shall state the number of shares owned by the person voting, the name of the person voting, and the word "Yes," if the vote be an affirmative vote, and the word "No," if the vote be a negative vote, or the name of the person voted for if it be a vote for the election of a director.

Sec. 11. All meetings, either of stockholders or directors, shall be presided over by the president; and at all meetings of the directors the president may vote, and he may also vote at any stockholders' meeting in addition to the case provided for by the last section, whenever a stock vote is taken. In the absence of the president, the vice-president shall preside, and shall have all the powers herein conferred upon the president when acting as presiding officer of a meeting.

#### INSPECTORS OF ELECTION.

Sec. 12. At all meetings for election of directors, two inspectors of election shall be first elected by a majority stock vote of all the stockholders present at the meeting, in person or by proxy, provided that no person who is a candidate for the office of director shall be elected an inspector.

#### ORDER OF BUSINESS.

Sec. 13. At all meetings of stockholders the following order of business shall be observed, so far as consistent with the purpose of the meeting, viz.:

Reading minutes of preceding meeting and action thereon.

Report of president.

Report of treasurer.

Report of secretary.

Reports of committees.

Election of directors.

Unfinished business.

New business.

## ARTICLE II.

## DIRECTORS.

Section 1. The affairs of this company shall be managed by nine directors, who shall be annually chosen at the annual meeting of the stockholders, except as by these by-laws otherwise provided.

Sec. 2. All elections for directors shall be by ballot, and the poll at every such election shall be opened between the hours of nine a. m. and five p. m. and shall continue open at least one hour by daylight, and shall close before nine o'clock in the evening.

Sec. 3. In case a vacancy or vacancies, by death, resignation or otherwise, occurs in the board of directors between the time of the annual meetings, the remaining director or directors shall fill the vacancy or vacancies, by choosing from the stockholders as many persons as may be necessary to fill the vacancy or vacancies, and the person or persons so chosen shall be directors and hold office until their successors are elected.

Sec. 4. In case the entire board of directors should die or resign, then any stockholder may call a special meeting in the same manner that the president may call a special meeting, and new directors may be elected at such special meeting in the manner provided for the election of directors at annual meetings.

Sec. 5. Any director may resign his office at any time, such resignation to be made in writing, and it shall take effect from the time of its delivery to the president or to a majority of the board of directors.

Sec. 6. Any director who may be guilty of any fraud, or crime, or conduct prejudicial to the interests of this company, may be removed from his office by an affirmative majority vote of the other directors, and the remaining directors shall immediately after such vote declare the office of such director vacant, and the vacancy so created shall be filled in the same manner any other vacancy may be filled.

## OTHER OFFICERS.

Sec. 7. The directors so chosen, immediately after their election, shall hold a meeting, at which they shall choose from among their number a president and a vice-president, and they shall at the same meeting choose a secretary, treasurer, and such other officers, agents and factors as they may deem necessary, who shall hold their offices until others are chosen and qualified in their stead.

Sec. 8. The board of directors shall also select an executive committee of five members, including the president, to possess and discharge all the powers of the board of directors during the intervals between its meetings. Of this committee three shall constitute a

quorum for the transaction of business, but no action taken by it shall be valid unless the same have the affirmative vote of at least three members.

Sec. 9. Said board of directors may adopt such rules and regulations for the conduct of their meetings and management of the affairs of this company as they may deem proper, not inconsistent with the law of the state of New York or these by-laws.

Sec. 10. The salary of all officers shall be fixed by a majority vote of the board of directors, and may be changed from time to time as by said board of directors may be determined.

Sec. 11. The directors may hold their meetings at such time and times and place and places, either within or without the state, as they may determine upon. Notice of such meeting shall be given by mailing a notice thereof to each director, to his post-office address as appearing in the records of the company, not less than three days before such meeting.

### ARTICLE III.

#### POWERS OF OFFICERS.

Section 1. *President*.—The president shall have power to employ and discharge all clerks, employés and agents; subject, however, to the right of the board of directors to direct, by a majority vote, the employment of any agent or other employé, or the dismissal of any agent or employé. The president shall also preside at all meetings of the company, or meetings of the stockholders of the company, and of the board of directors; shall be ex-officio a member of all committees, and shall perform such other duties as he may be directed to perform by the board of directors, and shall have a general oversight over the business and affairs of the company.

Sec. 2. *Vice-President*.—The vice-president shall, in the absence or incapacity of the president, perform the duties of that officer.

Sec. 3. *Treasurer*.—The treasurer shall deposit the money and securities belonging to this company in such bank or banks, trust companies and safe-deposit vaults as may be selected by the board of directors, and all checks or other orders for the payment of money or the delivery of securities belonging to this company shall be signed by the president and treasurer or by such other person with the treasurer as the board of directors may designate, and no payment for a greater sum than one hundred dollars shall be made except by check. The treasurer shall also keep such books of account as the directors, or a majority of them, may direct. A report of the financial condition of the company shall be made by the treasurer to the president whenever requested by the president, and a report of like character shall be submitted by the treasurer at the annual meeting; and he shall, if required by the directors at any time, give such bond

as the directors may require, and failure so to do within five days thereafter shall be held to forfeit and vacate, and shall forfeit and vacate, the office of treasurer. Every person accepting the office of treasurer shall hold the same subject to the last-mentioned limitations. The treasurer shall also sign all certificates of stock, and perform such other duties as the board of directors may require.

Sec. 4. *Secretary*.—The secretary shall be sworn to the faithful discharge of his duty, and shall record all the votes of the company and directors in a book to be kept for that purpose. He shall record all transfers of stocks and cancel and preserve all certificates of stock transferred, and he shall also keep a record alphabetically arranged of all persons who are stockholders of this company, showing their places of residence, the number of shares of stock held by them respectively, and the time when they became the owners of such shares. The address of any stockholder shall be changed whenever requested in writing by such stockholder. The secretary shall also be the transfer agent of the company for the transfer of all certificates of stock. He shall also keep the seal of the company, and affix the same to all certificates of stock and such other instruments requiring the seal as may be directed by the board of directors. The secretary shall also keep such other books and perform such other duties as may be assigned to him.

#### ARTICLE IV.

##### STOCK.

Section 1. All certificates of stock shall be signed by the president or vice-president and treasurer, and be attested by the corporate seal.

Sec. 2. Certificates of stock may be transferred, sold, assigned or pledged by an endorsement to the proper effect in writing on the back of the certificate, and delivery of such certificate by the transferrer to the transferee; provided that until notice given of such transfer to the secretary of the company, and the surrender of the certificate of stock for cancellation, and the issue of a new certificate in lieu of that surrendered, this company may regard and treat the transferrer as being still the owner of the stock.

Sec. 3. All surrendered certificates shall be marked cancelled, with the date of cancellation, by the secretary, and shall be immediately pasted into the stock-book opposite the memorandum of their issue.

Sec. 4. Duplicate certificates of stock may be issued for such as may have been lost or destroyed, upon the applicant furnishing (1) an affidavit of ownership and loss and (2) a bond of indemnity satisfactory to the company and conditioned to protect the company against all loss and damage which may occur in consequence of the issue of said duplicate certificate. And no such duplicate shall be

issued until after publication once a week for three weeks, at the expense of the applicant, of a notice of the application therefor in some newspaper of general circulation designated by the president, published in the city of the applicant's residence.

#### ARTICLE V.

##### MISCELLANEOUS.

Section 1. The seal of the company shall be circular in form, with the words "....." on the circumference, and the words "New York" in the centre.

Sec. 2. The fiscal or business year of the company shall begin on the first day of October and end on the thirtieth day of September following.

Sec. 3. Dividends shall be declared annually, or more frequently if the board shall so direct, from the surplus or net profits arising from the business of this corporation.

Sec. 4. These by-laws may be amended at any directors' meeting by vote of two-thirds of the whole board of directors. They may also be amended at any stockholders' meeting by a vote of stockholders owning not less than twenty-five per cent. of the entire capital stock issued. A copy of such amended by-laws shall be sent to each stockholder within thirty days after their adoption.

### § 319a. By-Laws of United States Steel Corporation as on May 3, 1904.

#### ARTICLE I.

##### STOCKHOLDERS.

Section 1. *Annual Meeting.* The annual meeting of the stockholders of the company shall be held annually at the principal office of the company in the state of New Jersey, at twelve o'clock noon, on the third Monday of April in each year, if not a legal holiday, and if a legal holiday then on the next succeeding Monday not a legal holiday, for the purpose of electing directors, and for the transaction of such other business as may be brought before the meeting; and the terms of office of the directors of the several classes shall continue until the election of their successors at such meeting as provided in article II hereof.

It shall be the duty of the secretary to cause notice of each annual meeting to be published once in each of the four calendar weeks next preceding the meeting in at least one newspaper in each of the following places: Jersey City, N. J., New York, N. Y., Chicago, Ill., and

Stockholders'  
Annual  
Meeting.

Date of  
Meeting.

Advertising  
Notice of  
Meeting.

Pittsburg, Pa. Nevertheless, a failure to publish such notice, or any irregularity in such notice, or in the publication thereof, shall not affect the validity of any annual meeting, or of any proceedings at any such meeting.

**Special Meetings.** Section 2. *Special Meetings.* Special meetings of the stockholders may be held at the principal office of the company in the state of New Jersey, whenever called in writing, or by vote, by a majority of the board of directors.

**Advertising Notice of Meeting.** Notice of each special meeting, indicating briefly the object or objects thereof, shall by the secretary be published once in each of the four calendar weeks next preceding the meeting, in at least one newspaper in each of the following places: Jersey City, N. J., New York, N. Y., Chicago, Ill., and Pittsburg, Pa. Nevertheless, if all the stockholders shall waive notice of a special meeting, no notice of such meeting shall be required; and whenever all the stockholders shall meet in person or by proxy, such meeting shall be valid for all purposes without call or notice, and at such meeting any corporate action may be taken.

**Quorum.** Section 3. *Quorum.* At any meeting of the stockholders the holders of one-third of all of the shares of the capital stock of the company, present in person or represented by proxy, shall constitute a quorum of the stockholders for all purposes, unless the representation of a larger number shall be required by law, and, in that case, the representation of the number so required, shall constitute a quorum.

If the holders of the amount of stock necessary to constitute a quorum shall fail to attend in person or by proxy at the time and place fixed by these by-laws for an annual meeting, or fixed by notice as above provided for a special meeting called by the directors, a majority in interest of the stockholders present in person or by proxy may adjourn, from time to time, without notice other than by announcement at the meeting, until holders of the amount of stock requisite to constitute a quorum shall attend. At any such adjourned meeting at which a quorum shall be present, any business may be transacted which might have been transacted at the meeting as originally notified.

**Organization.** Section 4. *Organization.* The chairman of the board, and in his absence, the chairman of the finance committee, and in the absence of both, the president, shall call meetings of the stockholders to order, and shall act as chairman of such meetings. The board of directors may appoint any stockholder to act as chairman of any meeting in the absence of the chairman of the board and of the chairman of the finance committee and of the president.

**Chairman.**

The secretary of the company shall act as secretary at all meetings of the stockholders; but in the absence of the secretary at any meeting of the stockholders the presiding officer may appoint any person to act as secretary of the meeting.

Secretary.

Section 5. *Voting.* At each meeting of the stockholders, every stockholder shall be entitled to vote in person, or by proxy appointed by instrument in writing, subscribed by such stockholder or by his duly authorized attorney, and delivered to the inspectors at the meeting; and he shall have one vote for each share of stock standing registered in his name at the time of the closing of the transfer books for said meeting. The votes for directors, and, upon demand of any stockholder, the votes upon any question before the meeting, shall be by ballot.

Voting.

At each meeting of the stockholders, a full, true and complete list, in alphabetical order, of all of the stockholders entitled to vote at such meeting, and indicating the number of shares held by each, certified by the secretary or by the treasurer, shall be furnished. Only the persons in whose names shares of stock stand on the books of the company at the time of the closing of the transfer books for such meeting, as evidenced by the list of stockholders so furnished, shall be entitled to vote in person or by proxy on the shares so standing in their names.

List of  
Stockholders.

Prior to any meeting, but subsequent to the time of closing the transfer books for such meeting, any proxy may submit his powers of attorney to the secretary, or to the treasurer, for examination. The certificate of the secretary, or of the treasurer, as to the regularity of such powers of attorney, and as to the number of shares held by the persons who severally and respectively executed such powers of attorney, shall be received as prima facie evidence of the number of shares represented by the holder of such powers of attorney for the purpose of establishing the presence of a quorum at such meeting and of organizing the same, and for all other purposes.

Section 6. *Inspectors.* At each meeting of the stockholders, the polls shall be opened and closed, the proxies and ballots shall be received and be taken in charge, and all questions touching the qualification of voters and the validity of proxies and the acceptance or rejection of votes, shall be decided by three inspectors. Such inspectors shall be appointed by the board of directors before or at the meeting, or, if no such appointment shall have been made, then by the presiding officer at the meeting. If for any reason any of the inspectors previously appointed shall fail to attend or refuse or be unable to serve, inspectors in place of any so failing to attend or refusing or unable to attend, shall be appointed in like manner.

Inspectors of  
Election.

## ARTICLE II.

## BOARD OF DIRECTORS.

**Section 1. *Number, Classification and Term of Office.*** The business and the property of the company shall be managed and controlled by the board of directors.

**As provided** in the certificate of incorporation, the directors shall be classified in respect of the time for which they shall severally hold office, by dividing them into three classes, each class consisting of one-third of the whole number of the board of directors. The directors of the first class shall be elected for a term of one year; the directors of the second class shall be elected for a term of two years, and the directors of the third class shall be elected for a term of three years. At each annual election, the successors to the directors of the class whose term shall expire in that year, shall be elected to hold office for the term of three years, so that the term of office of one class of directors shall expire in each year.

The number of directors shall be twenty-four; but the number of directors may be altered from time to time by the alteration of these by-laws.

In case of any increase of the number of directors, the additional directors shall be elected by the directors then in office; one-third of such additional directors for the unexpired portion of the term of one year; one-third for the unexpired portion of the term of two years, and one-third for the unexpired portion of the term of three years, so that each class of directors shall be increased equally.

Every director shall be a holder of at least one share of the capital stock of the company. Each director shall serve for the term for which he shall have been elected, and until his successor shall have been duly chosen.

At all elections of the directors, the polls shall remain open for at least one hour, unless every registered owner of shares has sooner voted in person or by proxy, or in writing has waived the statutory provision.

**Section 2. *Vacancies.*** In case of any vacancy in the directors of any class through death, resignation, disqualification or other cause, the remaining directors, by affirmative vote of a majority thereof, may elect a successor to hold office for the unexpired portion of the term of the director whose place shall be vacant, and until the election of his successor.

Such vacancy shall be filled upon and after nominations therefor shall have been made by the finance committee.

**Section 3. *Place of Meeting, Etc.*** The directors may hold their meetings, and may have an office and keep the books of the company (except as otherwise may be provided for by law) in such place or places in the state of New Jersey or outside of the state of New Jersey, as the board from time to time may determine.

**Section 4. *Regular Meetings.*** Regular meetings of the board of directors shall be held monthly on the last Tuesday of each month, if not a legal holiday, and if a legal holiday, then on the next succeeding Tuesday not a legal holiday. No notice shall be required for any such regular monthly meeting of the board.

**Section 5. *Special Meetings.*** Special meetings of the board of directors shall be held whenever called by direction of the chairman of the board, or the chairman of the finance committee, or the president, or of one-third of the directors for the time being in office.

The secretary shall give notice of each special meeting by mailing the same at least two days before the meeting, or by telegraphing the same at least one day before the meeting, to each director; but such notice may be waived by any director. Unless otherwise indicated in the notice thereof, any and all business may be transacted at a special meeting. At any meeting at which every director shall be present, even though without any notice, any business may be transacted.

**Section 6. *Quorum.*** A majority of the board of directors shall constitute a quorum for the transaction of business; but if at any meeting of the board there be less than a quorum present, a majority of those present may adjourn the meeting from time to time.

The affirmative vote of at least two-fifths of all the directors for the time being in office shall be necessary for the passage of any resolution.

**Section 7. *Order of Business.*** At meetings of the board of directors business shall be transacted in such order as, from time to time, the board may determine by resolution.

At all meetings of the board of directors, the chairman of the board, or in his absence the chairman of the finance committee, or, in the absence of both of these officers, the president, shall preside.

**Section 8. *Contracts.*** Inasmuch as the directors of this company are men of large and diversified business interests, and are likely to be connected with other corporations with which from time to time this company must have

business dealings, no contract or other transaction between this company and any other corporation shall be affected by the fact that directors of this company are interested in, or are directors or officers of, such other corporation, if, at the meeting of the board, or of the committee of this company, making, authorizing or confirming such contract or transaction, there shall be present a quorum of directors not so interested; and any director individually may be a party to, or may be interested in, any contract or transaction of this company, provided that such contract or transaction shall be approved or be ratified by the affirmative vote of at least ten

Requiring Vote  
of at Least Ten  
Disinterested  
Directors.

directors not so interested.

The board of directors in its discretion may submit any contract or act for approval or ratification at any annual meeting of the stockholders, or at any meeting of the stockholders called for the purpose of considering any such act or contract; and any contract or act that shall be approved or be ratified by the vote of the holders of a majority of the capital stock of the company which is represented in person or by proxy at such meeting (provided that a lawful quorum of stockholders be there represented in person or by proxy) shall be as valid and as binding upon the corporation and upon all the stockholders as though it had been approved or ratified by every stockholder of the corporation.

Ratification by  
Stockholders  
of Acts or  
Contracts.

Section 9. *Compensation of Directors.* For his attendance at any meeting of the board of directors, or of any committee, every director shall receive an allowance of twenty dollars for attendance at each meeting.

Compensation  
of Directors.

Section 10. *Election of Officers and Committees.* At the first regular meeting of the board of directors in each year (at which a quorum shall be present) held next after the annual meeting, the board of directors shall proceed to the election of the executive officers of the company, and of the finance committee to be elected by the board of directors under the provisions of article III and article IV of the by-laws.

Election of  
Officers and  
Committees.

### ARTICLE III.

#### FINANCE COMMITTEE.

Section 1. The board of directors shall elect from the directors a *finance committee*, and shall designate for such committee a chairman, who shall continue to be chairman of the committee during the pleasure of the board of directors.

Finance  
Committee.

The board of directors shall fill vacancies in the finance committee by election from the directors; and at all times it shall be the duty of the board of directors to keep the membership of such committee full, with due regard to the qualifications for such membership indicated in this article of the by-laws.

Vacancies;  
How Filled.

All action by the finance committee shall be reported to the board of directors at its meeting next succeeding such action, and shall be subject to revision or alteration by the board of directors; provided that no rights or acts of third parties shall be affected by any such revision or alteration.

Action of  
Committee  
to be Reported  
to Board.

The finance committee shall fix its own rules of proceeding, and shall meet where and as provided by such rules, or by resolution of the board of directors, but in every case the presence of at least four members shall be necessary to constitute a quorum.

Rules of  
Procedure.

In every case the affirmative vote of a majority of all of the members of the committee present at the meeting, shall be necessary to its adoption of any resolution.

Section 2. *The finance committee* shall consist of seven members, besides the chairman of the board and the president, each of whom, by virtue of his office, shall be a member of the finance committee. So far as practicable each of the seven elected members of the finance committee shall be a person of experience in matters of finance. Unless otherwise ordered by the board of directors, each elected member of the finance committee shall continue to be a member thereof until the expiration of his term of office as a director.

Membership.

The finance committee shall have special charge and control of all financial affairs of the company. The general counsel, the treasurer, the comptroller and the secretary, and their respective offices, shall be under the direct control and supervision of the finance committee.

Powers and  
Duties.

During the intervals between the meetings of the board of directors, the finance committee shall possess, and may exercise, all the powers of the board of directors in the management of all of the affairs of the company, including its purchases of property, and the execution of legal instruments with or without the corporate seal in such manner as said committee shall deem to be best for the interests of the company, in all cases in which specific directions shall not have been given by the board of directors.

During the intervals between the meetings of the finance com-

mittee, and subject to its review, the chairman of the board and the chairman of the finance committee together, shall possess, and may exercise any of the powers of the committee, except as from time to time shall be otherwise provided by resolution of the board of directors.

Powers of  
Chairmen.

Except as otherwise provided by the by-laws, or by resolution of the board of directors, all salaries and compensations paid or payable by the company shall be fixed by the finance committee.

Salaries Fixed  
by Finance  
Committee.

No director not an executive officer shall become a salaried employee of the company except by special vote of the finance committee.

#### ARTICLE IV.

##### ADVISORY COMMITTEE.

The board of directors shall elect from the directors an advisory committee. The committee shall consist of three members, besides the president of the corporation, who by virtue of his office shall be a member and chairman of the committee. This committee, from time to time, shall consider and make recommendations concerning such questions relating to manufacturing, transportation or operation as may be submitted to the committee by the president.

Advisory  
Committee.

#### ARTICLE V.

##### OFFICERS.

Section 1. *Officers.* The executive officers of the company shall be a chairman of the board of directors, a president, a vice-president, or more than one vice-president, a general counsel, a treasurer, a secretary and a comptroller, all of whom shall be elected by the board of directors.

Officers.  
Titles.

The board of directors may appoint such other officers as they shall deem necessary, who shall have such authority and shall perform such duties as from time to time may be prescribed by the board of directors.

Other Officers.

The powers and duties of the treasurer and secretary may be exercised and performed by the same person.

In its discretion, the board of directors by the vote of a majority thereof may leave unfilled for any such period as it may fix by resolution, any office except those of president, treasurer, secretary and comptroller.

All officers and agents shall be subject to removal at any time by the affirmative vote of a majority of the whole board of directors. All officers, agents and employees, other than officers appointed by the board of directors, shall hold office at the discretion of the committee or of the officer appointing them.

Each of the salaried officers of the corporation shall devote his entire time, skill and energy to the business of the corporation, unless the contrary is expressly consented to by the board of directors or the finance committee. No vacations shall be taken by any of such officers, except by consent of the board of directors or the finance committee.

The finance committee shall have power to remove all officers, agents and employees of the company, except officers elected or appointed by the board of directors.

**Section 2. *Powers and Duties of the Chairman of the Board.***  
The chairman of the board of directors shall preside at all meetings of the stockholders and of the board of directors; and by virtue of his office shall be a member of the finance committee. He shall have supervision of such matters as may be designated to him by the board of directors or the finance committee.

**Section 3. *Powers and Duties of the President.*** In the absence of the chairman of the board and the chairman of the finance committee, the president shall preside at all meetings of the stockholders and of the board of directors. By virtue of his office he shall be a member of the finance committee. Subject to the board of directors and the finance committee, he shall have general charge of the business of the corporation relating to manufacturing, mining and transportation and general operation. He shall keep the board of directors and the finance committee fully informed, and shall freely consult them concerning the business of the corporation in his charge. He may sign and execute all authorized bonds, contracts, checks or other obligations in the name of the corporation, and with the treasurer or an assistant treasurer may sign all certificates of the shares in the capital stock of the corporation. He shall do and perform such other duties as from time to time may be assigned to him by the board of directors.

**Section 4. *Vice-Presidents.*** The board of directors may appoint a vice-president or more than one vice-president. Each vice-president shall have such powers, and shall perform such duties, as may be assigned to him by the board of directors.

Section 5. *The General Counsel.* The general counsel shall be the chief consulting officer of the company in all legal matters, and subject to the board of directors and the finance committee, shall have general control of all matters of legal import concerning the company.

General  
Counsel.

Section 6. *Powers and Duties of Treasurer.* The treasurer shall have custody of all the funds and securities of the company which may have come into his hands; when necessary or proper he shall endorse on behalf of the company, for collection, checks, notes and other obligations, and shall deposit the same to the credit of the company in such bank or banks or depository as the board of directors or the finance committee may designate; he shall sign all receipts and vouchers for payments made to the company; jointly with such other officer as may be designated by the finance committee, he shall sign all checks made by the company, and shall pay out and dispose of the same under the direction of the board or of the finance committee; he shall sign with the president, or such other person or persons as may be designated for the purpose by the board of directors or the finance committee, all bills of exchange and promissory notes of the company; he may sign, with the president or a vice-president, all certificates of shares in the capital stock; whenever required by the board of directors or by the finance committee, he shall render a statement of his cash account; he shall enter regularly, in books of the company to be kept by him for the purpose, full and accurate account of all moneys received and paid by him on account of the company; he shall, at all reasonable times, exhibit his books and accounts to any director of the company upon application at the office of the company during business hours; and he shall perform all acts incident to the position of treasurer, subject to the control of the board of directors or of the finance committee.

Treasurer.  
Powers and  
Duties.

He shall give a bond for the faithful discharge of his duties in such sum as the board of directors or the finance committee may require.

Section 7. *Assistant Treasurers.* The board of directors or the finance committee may appoint an assistant treasurer or more than one assistant treasurer. Each assistant treasurer shall have such powers and shall perform such duties as may be assigned to him by the board of directors, or by the finance committee.

Assistant  
Treasurers.

Section 8. *Powers and Duties of Secretary.* The secretary shall keep the minutes of all meetings of the board of directors, and the minutes of all meetings of the stockholders, and also (unless otherwise directed by the finance committee) the minutes of all committees, in

Secretary.  
Powers and  
Duties.

books provided for that purpose; he shall attend to the giving and serving of all notices of the company; he may sign with the president, in the name of the company, all contracts authorized by the board of directors or by the finance committee, and, when so ordered by the board of directors or the finance committee, he shall affix the seal of the company thereto; he shall have charge of the certificate books, transfer books and stock ledgers, and such other books and papers as the board of directors or the finance committee may direct, all of which shall, at all reasonable times, be open to the examination of any director, upon application at the office of the company during business hours; and he shall in general perform all the duties incident to the office of secretary, subject to the control of the board of directors and of the finance committee. The offices of secretary and of treasurer may be held by one and the same person.

**Assistant Secretaries.** Section 9. *Assistant Secretaries.* The board of directors or the finance committee may appoint one assistant secretary or more than one assistant secretary. Each assistant secretary shall have such powers and shall perform such duties as may be assigned to him by the board of directors or by the finance committee.

**Comptroller.** Section 10. *Comptroller.* The comptroller shall be the principal officer in charge of the accounts of the company, and shall perform such duties as from time to time may be assigned to him by the board of directors or the finance committee.

**Voting Upon Stocks Owned in Other Companies.** Section 11. *Voting upon Stocks.* Unless otherwise ordered by the board of directors or by the finance committee, the chairman of the board or the chairman of the finance committee shall have full power and authority in behalf of the company to attend and to act and to vote at any meetings of stockholders of any corporation in which the company may hold stock, and at any such meeting shall possess and may exercise any and all the rights and powers incident to the ownership of such stock, and which, as the owner thereof, the company might have possessed and exercised if present. The board of directors or the finance committee, by resolution, from time to time, may confer like powers upon any other person or persons.

## ARTICLE VI.

### CAPITAL STOCK—SEAL.

**Stock Certificates.** Section 1. *Certificates of Shares.* The certificates for shares of the capital stock of the company shall be in such form, not inconsistent with the certificate of incorporation, as shall be prepared or be approved by the board of

directors. The certificates shall be signed by the president or a vice-president, and also by the treasurer or an assistant treasurer.

All certificates shall be consecutively numbered. The name of the person owning the shares represented thereby, with the number of such shares and the date of issue, shall be entered on the company's books.

No certificate shall be valid unless it is signed by the president or a vice-president, and by the treasurer or an assistant treasurer.

All certificates surrendered to the company shall be canceled, and no new certificate shall be issued until the former certificate for the same number of shares of the same class shall have been surrendered and canceled.

**Section 2. *Transfer of Shares.*** Shares in the capital stock of the company shall be transferred only on the books of the company by the holder thereof in person, or by his attorney, upon surrender and cancellation of certificates for a like number of shares.

**Section 3. *Regulations.*** The board of directors, and the finance committee also, shall have power and authority to make all such rules and regulations as respectively they may deem expedient, concerning the issue, transfer and registration of certificates for shares of the capital stock of the company.

The board of directors or the finance committee may appoint a transfer agent and a registrar of transfers, and may require all stock certificates to bear the signature of such transfer agent and of such registrar of transfers.

**Section 4. *Closing of Transfer Books.*** The stock transfer books shall be closed for the meetings of the stockholders, and for the payment of dividends, during such periods as from time to time may be fixed by the board of directors or by the finance committee, and during such periods no stock shall be transferable.

**Section 5. *Dividends.*** The board of directors may declare dividends from the surplus or from the net profits of the company.

The dates for the declaration of dividends upon the preferred stock and upon the common stock of the company shall be the days by these by-laws fixed for the regular monthly meetings of the board of directors in the months of April, July, October and January in each year, on which days the board of directors, in its discretion, shall declare what, if any, dividends shall be declared upon the preferred stock and the common stock, or either of such stocks.

The dividends upon the preferred stock, if declared, severally and

respectively, shall be payable quarterly upon the thirtieth day of May, of August, of November and the last day of February in each year.

The dividends upon the common stock, if declared, severally and respectively, shall be payable quarterly on the thirtieth day of June, of September, of December and of March in each year.

If the date herein appointed for the payment of any dividend shall in any year fall upon a legal holiday, then the dividend payable on such date shall be paid on the next day not a legal holiday.

**Section 6. *Working Capital.*** The directors shall not be required in January in each year, after reserving over and above its capital stock paid in, as a working capital for said corporation, such sum, if any, as shall have been fixed by the stockholders, to declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount so reserved, and pay the same to such stockholders on demand; but the board of directors may fix a sum which may be set aside or reserved, over and above the company's capital paid in, as a working capital for the company, and from time to time they may increase, diminish and vary the same in their absolute judgment and discretion.

**Section 7. *Corporate Seal.*** The board of directors shall provide a suitable seal, containing the name of the company, which seal shall be in charge of the secretary. If and when so directed by the board of directors or by the finance committee, a duplicate of the seal may be kept and be used by the treasurer or by any assistant secretary or assistant treasurer.

## ARTICLE VII.

### AMENDMENTS.

**Section 1.** The board of directors shall have power to make, amend and repeal the by-laws of the company, by vote of a majority of all of the directors, at any regular or special meeting of the board, provided that notice of intention to make, amend or repeal the by-laws in whole or in part shall have been given at the next preceding meeting; or without any such notice, by a vote of two-thirds of all the directors.

## CHAPTER XV

## DIRECTORS

- § 320. Eligibility.
- 321. Powers.
  - 322. 1. Appointing Committees.
  - 323. 2. Must Act as a Board.
  - 324. 3. Fiduciary Nature of Relation.
- 325. Liabilities.
- 326. Resignation.
- 327. Disqualification.
- 328. Filling Vacancies.

## § 320. Eligibility.

While prudent business policy would require that every director should be a stockholder, the common law does not forbid a person not a stockholder becoming a director.<sup>1</sup> Statutes generally require a director to be a stockholder.<sup>2</sup> From this fact has sprung up the custom of transferring a few shares of stock to "dummies" to qualify them for office, the transfer being recorded on the books of the company, but the certificates being retransferred in blank and delivered back to the original owners without the retransfer being recorded on the corporate books. This practice has been uniformly condemned by the courts.<sup>3</sup> But if the stock has not been transferred back, and still stands in good faith in the name of the "dummy," although he may hold but a few shares, he is qualified

<sup>1</sup> *Fey v. Peoria Watch Co.*, 32 Ill. App. 618; *Wight v. Springfield & N. L. R. Co.*, 117 Mass. 226, 19 Am. Rep. 412; *Hoyt v. Bridgewater Copper Mining Co.*, 6 N. J. Eq. (2 Halst. Ch.) 253; *State ex rel. Attorney General v. McDaniel*, 22 Ohio St. 354; *In re Corporate Directors*, 7 Pa. Co. Ct. R. 178; *Bristol Bank & Trust Co. v. Jonesboro Banking Trust Co.*, 101 Tenn. 545, 48 S. W. 228.

<sup>2</sup> See chapter VII, §§ 85-90, 92, 95.

<sup>3</sup> *Bartholomew v. Bentley*, 1 Ohio St. 37; *Frank v. Lewis Foundry & Machinery Co.*, 24 Pittsb. Leg. J. N. S. (Pa.) 33.

as a director.<sup>4</sup> A person holding stock in a fiduciary capacity merely is eligible as a director, some earlier decisions to the contrary in New York having been overruled.<sup>5</sup> It has been held that under statutes which require the certificate of incorporation to set forth the number of the directors and the names and residences of those chosen for the first year, the directors named in the certificate may be changed, even during the first year of the corporation.<sup>6</sup>

### § 321. Powers.

The authority of the directors to appoint, control, and direct the labors of its subordinate agents is necessarily implied.<sup>7</sup> They are the managing body, to whom the stockholders must look for the conduct of the business.<sup>8</sup> They usually elect all the administrative officers, as well as appoint the subordinates. They may order an assessment on unpaid stock.<sup>9</sup> They may use such of the profits of the corporation as they see fit in the legitimate conduct of the business.<sup>10</sup> They may authorize

<sup>4</sup> *In re Geo. Ringler & Co.*, 204 N. Y. 30, 97 N. E. 593; *Kuhn v. Woolson Spice Co.*, 13 Ohio Cir. Ct. R. 547, 7 Ohio Dec. 289.

<sup>5</sup> *Schmidt v. Mitchell*, 101 Ky. 570, 41 S. W. 929, 19 Ky. Law Rep. 763, 72 Am. St. Rep. 427; *In re Geo. Ringler & Co.*, 130 N. Y. Supp. 62, 145 App. Div. 361, overruling and modifying *In re Elias*, 40 N. Y. Supp. 910, 17 Misc. Rep. 718; *In re Geo. Ringler & Co.*, 127 N. Y. Supp. 938, 70 Misc. Rep. 581.

<sup>6</sup> *Commonwealth ex rel. Genth v. Helms* (Com. Pl.) 8 Pa. Co. Ct. R. 410.

<sup>7</sup> *Batchelor v. Planters' Nat. Bank of Louisville*, 78 Ky. 435.

<sup>8</sup> *Genesee Co. Savings Bank v. Michigan Barge Co.*, 52 Mich. 164, 438, 17 N. W. 790, 18 N. W. 206.

<sup>9</sup> *Oglesby v. Attrill*, 105 U. S. 605, 26 L. Ed. 1186; *Millaudon v. New Orleans & C. R. Co.*, 3 Rob. (La.) 488; *Smith v. Natchez Steamboat Co.*, 1 How. (Miss.) 479; *Gorman v. Guardian Savings Bank*, 4 Mo. App. 180.

<sup>10</sup> *Pratt v. Pratt, Read & Co.*, 33 Conn. 446; *State v. Bank of Louisiana*, 6 La. 745; *State v. Baltimore & O. R. Co.*, 6 Gill (Md.) 363.

the creation of a bonded indebtedness secured by mortgage.<sup>11</sup> The question of the propriety and amount of dividends is exclusively reserved for their decision, in the absence of fraud.<sup>12</sup> The board of directors has no power, however, to increase or diminish the capital stock,<sup>13</sup> nor to dissolve the corporation,<sup>14</sup> nor to consolidate it with some other.<sup>15</sup>

### § 322. Appointing Committees.

The directors may, if occasion requires, appoint committees, including an executive committee, with power to act for the board of directors.<sup>16</sup>

### § 323. Must Act as a Board.

Directors must act together as a board in all matters involving the exercise of discretion. The stockholders have a

<sup>11</sup> *Hodder v. Kentucky & G. E. R. Co.* (C. C.) 7 Fed. 793; 3 *Cook, Corp.* § 808, and note; 3 *Clark & Mar. Corp.* § 691c, and notes. See chapter XXII, § 445.

<sup>12</sup> *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786; *State v. Bank of Louisiana*, 6 La. 745; *Belfast & M. L. R. Co. v. City of Belfast*, 77 Me. 445, 1 Atl. 362; *Hunter v. Roberts, Throp & Co.*, 83 Mich. 63, 47 N. W. 131; *King v. Paterson & H. R. Co.*, 29 N. J. Law (5 Dutch.) 82; *Karnes v. Rochester & G. V. R. Co.*, 4 Abb. Prac. N. S. (N. Y.) 107; 2 *Cook, Corp.* § 545, and notes; 10 Cyc. 548, 549, 883, and cases cited. See chapter XX, § 409.

<sup>13</sup> *Chicago City Ry. Co. v. Allerton*, 85 U. S. (18 Wall.) 233, 21 L. Ed. 902; *Payson v. Stoeve*, Fed. Cas. No. 10,863, 2 Dill. 427; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *New York & N. H. R. Co. v. Schuyler*, 38 Barb. (N. Y.) 534.

<sup>14</sup> *Lake Ontario Nat. Bank v. Onondaga County Bank*, 7 Hun (N. Y.) 549; *Assets Realization Co. v. Howard*, 127 N. Y. Supp. 798, 70 Misc. Rep. 651.

<sup>15</sup> *Blatchford v. Ross*, 54 Barb. (N. Y.) 42; *Id.*, 37 How. Prac. (N. Y.) 110; *Id.*, 5 Abb. Prac. N. S. (N. Y.) 434.

<sup>16</sup> *Sheridan Electric Light Co. v. Chatham Nat. Bank*, 127 N. Y. 517, 28 N. E. 467; *First Nat. Bank of Binghamton v. Commercial Travelers' Home Ass'n*, 185 N. Y. 575, 78 N. E. 1103.

right to insist upon the opportunity for free discussion and interchange of views, and, unless this is afforded, except in matters purely ministerial, the directors are not living up to the measure of the obligation imposed upon them. If they choose to take the risk of acting upon the individual assent of the various members of the board, they may, of course, do so; but if this action should not be subsequently ratified in meeting it would be void, and any steps taken under it might subject the party assuming to act in this way to liability.<sup>17</sup> In order to permit this individual assent outside of meeting to be legal and binding, the statutes sometimes provide that any action assented to by the directors in writing, although not at a meeting, shall be as valid as if the directors had been assembled to discuss the proposition. It is believed that, in the absence of a statute, if a charter should contain such a provision, no stockholder could be heard to object to this manner of procedure.<sup>18</sup>

### § 324. Fiduciary Nature of Relation.

The directors of a corporation are trustees for the benefit of the stockholders collectively, not merely for the majority.<sup>19</sup> This, however, does not make them the agents of the individual stockholders.<sup>20</sup> Whenever the individual interests of a director and those of the corporation may come in conflict, it

<sup>17</sup> *Kansas City Hay Press Co. v. Devo* (C. C.) 72 Fed. 717; *Johnson v. Sage*, 44 Pac. 641, 4 Idaho, 758; *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261; *Id.*, 26 Minn. 61, 1 N. W. 276; *Constant v. Rector*, etc., of St. Albans Church, 4 Daly (N. Y.) 305; *Filon v. Miller Brewing Co.*, 60 Hun, 582, 15 N. Y. Supp. 57; *Dennison v. Austin*, 15 Wis. 334, 336; 2 Cook, Corp. § 713*a*, and cases cited; *Clark & M. Corp.* § 677, and notes; 10 Cyc. 774-776.

<sup>18</sup> See chapter X, § 172.

<sup>19</sup> *Beers v. Bridgeport Spring Co.*, 42 Conn. 17; *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196.

<sup>20</sup> *Slee v. Bloom*, 20 Johns. (N. Y.) 669; *Moffat v. Winslow*, 7 Paige (N. Y.) 124.

is the duty of the director to retire, or at least to refrain from taking any action on the particular subject-matter involved.<sup>21</sup> The directors are only bound, in the management of the affairs of the corporation, to exercise such ordinary diligence as men of common prudence use in the management of their own affairs.<sup>22</sup>

### § 325. Liabilities.

A synopsis of the legislation of several of our states with regard to the liabilities of directors has been heretofore given.<sup>23</sup> In general, they are liable for breach of trust,<sup>24</sup> for declaring illegal dividends,<sup>25</sup> for illegal issues of stock knowingly made by them,<sup>26</sup> for willful false reports,<sup>27</sup> and for fraud generally.<sup>28</sup> They cannot secure to themselves an ad-

<sup>21</sup> *Covington & L. R. Co. v. Bowler's Heirs*, 72 Ky. (9 Bush) 468; *Cumberland Coal & Iron Co. v. Parish*, 42 Md. 598; *Spofford v. Texas Land Co.*, 50 How. Prac. (N. Y.) 522.

<sup>22</sup> *Smith v. Prattville Mfg. Co.*, 29 Ala. 503; *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513; *Hodges v. New England Screw Co.*, 3 R. I. 9; *Vance v. Phoenix Ins. Co.*, 72 Tenn. (4 Lea) 385; *Percy v. Mil-laudon*, 8 Mart. N. S. (La.) 68.

<sup>23</sup> See chapter VII, §§ 85-96.

<sup>24</sup> *Union Nat. Bank v. Douglass*, Fed. Cas. No. 14,375, 1 McCrary, 86; *Widrig v. Newport St. Ry. Co.*, 82 Ky. 511; *Shea v. Knoxville & K. R. Co.*, 65 Tenn. (6 Baxt.) 277.

<sup>25</sup> *Gaffney v. Colvill*, 6 Hill (N. Y.) 567; *Appeal of Gunkle*, 48 Pa. (12 Wright) 13. See chapter XX, § 422.

<sup>26</sup> *Huiskamp v. West* (C. C.) 47 Fed. 236; *Hilles v. Parrish*, 14 N. J. Eq. (1 McCart.) 380; *Continental Telegraph Co. v. Nelson*, 49 N. Y. Super. Ct. (17 Jones & S.) 197.

<sup>27</sup> *Salmon v. Richardson*, 30 Conn. 360, 79 Am. Dec. 255; *Hatch v. Attrell*, 1 N. Y. St. Rep. 497; *Brockway v. Ireland*, 61 How. Prac. (N. Y.) 372.

<sup>28</sup> *Emma Silver Mining Co. v. Park*, Fed. Cas. No. 4,467, 14 Blatchf. 411; *Jeffery v. J. W. Butler Paper Co.*, 37 Ill. App. 96; *Redmond v. Dickerson*, 9 N. J. Eq. (1 Stockt.) 507, 59 Am. Dec. 418.

vantage not common to all the stockholders.<sup>29</sup> While a director may make valid contracts with the corporation, if he deals fairly with the stockholders,<sup>30</sup> at the same time his dealings with it are viewed with jealousy by the courts, and may be set aside on slight grounds.<sup>31</sup>

### § 326. Resignation.

A statute providing that directors shall continue in office until their successors are elected or appointed and qualify does not prevent a director from resigning at any time.<sup>32</sup> This he may do either verbally or in writing,<sup>33</sup> and in the absence of statutory regulations a resignation takes effect at the time it is made, and does not require acceptance by the board of directors.<sup>34</sup>

### § 327. Disqualification.

Under statutes or charters which provide certain qualifications for directors, when directors cease to be thus qualified

<sup>29</sup> *Koehler v. Black River Falls Iron Co.*, 67 U. S. (2 Black.) 715, 17 L. Ed. 339; *Drury v. Cross*, 74 U. S. (7 Wall.) 299, 19 L. Ed. 40.

<sup>30</sup> *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. Ed. 328; *Barr v. Pittsburgh Plate Glass Co.*, 57 Fed. 86, 6 C. C. A. 260, 17 U. S. App. 124; *Louisa County Nat. Bank v. Traer* (Iowa) 16 N. W. 120.

<sup>31</sup> *Thomas v. Brownville, Ft. K. & P. R. Co.*, 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018; *American Graphophone Co. v. Smith*, 39 Wash. Law Rep. (D. C.) 506; *Port v. Russell*, 36 Ind. 60, 10 Am. Rep. 5; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 311; *Cumberland Coal & Iron Co. v. Sherman*, 30 Barb. (N. Y.) 553.

<sup>32</sup> *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, 35 L. Ed. 662; *Fearing v. Glenn*, 73 Fed. 116, 19 C. C. A. 388, 38 U. S. App. 424.

<sup>33</sup> *Fearing v. Glenn*, 73 Fed. 116, 19 C. C. A. 388, 38 U. S. App. 424.

<sup>34</sup> *International Bank of St. Louis v. Faber*, 86 Fed. 443, 30 C. C. A. 178; *Zeltner v. Henry Zeltner Brewing Co.*, 80 N. Y. Supp. 338, 79 App. Div. 136, 33 N. Y. Civ. Proc. R. 298.

the fact of disqualification of itself generally suffices to make their places on the board vacant, and it then becomes competent to fill those places.<sup>35</sup>

### § 328. Filling Vacancies.

Directors holding over after the date for election has passed are just as much directors de jure as if they had been re-elected by the stockholders. They continue in office until their successors are elected, or until they die, resign, or become disqualified.<sup>36</sup> A quorum of the board of directors consists of a majority of its members, in the absence of a statute or by-law to the contrary,<sup>37</sup> although such a by-law may be validly made.<sup>38</sup> If a majority is in attendance, a majority of that majority binds the board, though they may be a minority of the whole board.<sup>39</sup> When vacancies occur in the board, such vacancies must ordinarily be filled by the stockholders, unless

<sup>35</sup> *Anderson Carriage Co. v. Pungs*, 127 Mich. 543, 86 N. W. 1040; *Wright v. First Nat. Bank*, 52 N. J. Eq. (7 Dick.) 392, 28 Atl. 719; *Orr Water Ditch Co. v. Reno Water Co.*, 17 Nev. 166, 30 Pac. 695; *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380; *Chemical Nat. Bank of New York v. Colwell*, 132 N. Y. 250, 30 N. E. 644, reversing 9 N. Y. Supp. 285, 16 Daly, 28, and (Com. Pl.) 9 N. Y. Supp. 288; *Oudin & Bergman Fire Clay Min. & Mfg. Co. v. Conlan*, 34 Wash. 216, 75 Pac. 798.

<sup>36</sup> *Thorington v. Gould*, 59 Ala. 461; *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *Wier v. Bush*, 14 Ky. (4 Litt.) 429; *People v. Runkle*, 9 Johns. (N. Y.) 147; 3 *Clark & M. Corp.* § 665, and cases cited; 10 Cyc. 740, and cases cited.

<sup>37</sup> *Blackwell v. State*, 36 Ark. 178; *Sargent v. Webster*, 54 Mass. (13 Metc.) 497, 46 Am. Dec. 743; *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. (4 C. E. Green) 402; *Booker v. Young*, 53 Va. 303; 2 *Cook, Corp.* bottom page 1751, and note; 3 *Clark & M. Corp.* § 681. See chapter XVI, § 333.

<sup>38</sup> *Hoyt v. Shelden*, 16 N. Y. Super. Ct. (3 Bosw.) 267; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207.

<sup>39</sup> *Edgerly v. Emerson*, 23 N. H. (3 Fost.) 555, 55 Am. Dec. 207; 2 *Cook, Corp.* bottom p. 1751; 3 *Clark & M. Corp.* p. 2087.

the statutes, charter, or by-laws confer that power upon the directors, as is now generally the case.<sup>40</sup> An interesting question has arisen as to whether, in such an event, if the number of the board of directors be reduced, by death, resignation, disqualification, or otherwise, below a quorum, those remaining could fill the vacancies. It is generally held that they cannot do so.<sup>41</sup> Hence statutes have been passed in some jurisdictions, and charter provisions inserted or by-laws adopted in others, to prevent this interruption to the smooth running of corporate machinery.

<sup>40</sup> *Sylvania & G. R. Co. v. Hoge*, 129 Ga. 734, 59 S. E. 806; 2 Cook, Corp. § 603.

<sup>41</sup> *Moses v. Tompkins*, 84 Ala. 613, 4 South. 763; *Faure Electric Accumulator Co., Limited, v. Phillipart* (1888), 58 Law T. (N. S.) 525.

## CHAPTER XVI

### DIRECTORS' MEETINGS

- § 329. Place of Holding Meeting.
- 330. Notice of Meeting.
- 331. Waiver.
- 332. Proxies.
- 333. Organization.
- 334. Minutes of Incorporators' Meeting.
- 335. Election of Officers.
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- 349. Annual Meetings.
- 350. Minutes.
- 351. Meeting of Executive Committee.

#### § 329. Place of Holding Meeting.

Sufficient has already been said <sup>1</sup> to indicate that the first meeting of directors should be held within the state granting the charter, unless the statutes of that state permit the meeting to be held elsewhere, and that even in that case the wise course is to convene and transact the business of this first meeting

<sup>1</sup> *Place v. People*, 87 Ill. App. 527, affirmed *Place v. People ex rel. Wilkinson*, 192 Ill. 160, 61 N. E. 354; *Hilles v. Parrish*, 14 N. J. Eq. (1 McCarter) 380; *Ormsby v. Vermont Copper Mining Co.*, 56 N. Y. 623; *supra*, chapter X, § 167.

within its borders. Other meetings may safely be held outside the state, at least when the acts to be performed are merely ministerial.

### § 330. Notice of Meeting.

The same particularity should be observed with regard to notice, or waiver of notice, as was outlined when discussing the holding of the incorporators' meeting.<sup>2</sup> The form of notice heretofore inserted for the first meeting of the incorporators<sup>3</sup> can readily be adapted to the first meeting of directors. A form of waiver of notice of the first meeting in general use is the following:

### § 331. Waiver of Notice of First Meeting of Board of Directors.

The undersigned, directors of the ..... Company, a corporation created under the laws of the state of ....., do hereby call the first meeting of the directors of said company to be held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the .....noon, for the purpose of electing officers of the company, authorizing the issue of stock either for cash or for property, authorizing the purchase of property, and the transaction of such other business as the board may deem proper; and we hereby waive all the requirements of law and the by-laws of the company as to notice of time, place, and object of such meeting, and consent to the transaction thereof of any and all business pertaining to the company's affairs.

In testimony whereof we have signed these presents this .....  
day of ....., 19... ..  
.....

### § 332. Proxies.

An important distinction must be noted between stockholders and directors with regard to their right to vote by proxy. The directors are the trustees for the stockholding body, and

<sup>2</sup> Chapter XI, §§ 224, 230.

<sup>3</sup> Chapter XI, § 226.

cannot delegate their discretionary powers to others. Hence they are not permitted to vote by proxy.<sup>4</sup>

### § 333. Organization.

The first meeting of the directors will be organized in a manner similar to that of the incorporators' meeting.<sup>5</sup> It is well to have the minutes show who were present, but the question of stock representation, of course, does not enter into the directors' meeting. A majority of the directors constitutes a quorum, unless some different rule is prescribed by law, charter, or by-laws.<sup>6</sup>

### § 334. Minutes of Incorporators' Meeting.

In order that the directors may know what work has been committed to them by the stockholders, it is well to read the minutes of the incorporators' meeting.

### § 335. Election of Officers.

The election of officers would next be in order, together with a resolution fixing their salaries, if the salaries have not already been fixed by the stockholders or in the by-laws.

### § 336. Secretary's Oath.

If the secretary should be ordered to take an oath of office, as is in certain places customary, and as is required in New Jersey,<sup>7</sup> the oath will then be administered to him. The following form of oath would be proper:

<sup>4</sup> Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co., 93 Ala. 364, 9 South. 217; State ex rel. Schroeder v. Perkins, 90 Mo. App. 603; Craig Medicine Co. v. Merchants' Bank, 59 Hun, 561, 14 N. Y. Supp. 16.

<sup>5</sup> Chapter XIII, §§ 268-272.

<sup>6</sup> Wells v. Rahway White Rubber Co., 19 N. J. Eq. 402; 10 Cyc. 776, and cases cited; 2 Cook, Corp. bottom p. 1751; 3 Clark & M. Corp. p. 2085; chapter XV, § 328.

<sup>7</sup> New Jersey General Corporation Law (P. L. 1896, p. 281) § 13.

### § 337. Form of Secretary's Oath.

State of..... }  
County of..... } ss.:

....., secretary of the ..... .. Company, a corporation created and existing by virtue of the laws of the state of ..... , being first duly sworn, deposes and says that he will faithfully discharge his duties as secretary of said company to the best of his ability.

Subscribed and sworn to before me this ..... day of ..... ,  
A. D. 19...

[Notarial Seal.]

Notary Public.

### § 338. Treasurer's Bond.

The form of treasurer's bond, if any is required, should be passed upon, and, if the bond is ready for delivery, the sufficiency of the proposed sureties should be approved by a resolution to that effect. If a surety company is offered as security, its stereotyped form of bond for such cases will generally be insisted upon by it. Counsel for the corporation should carefully scrutinize the form, inasmuch as stipulations may be contained in it which might be prejudicial to the rights of the corporation. The ordinary bond, with individual security, is in the following or equivalent form:

### § 339. Form of Treasurer's Bond.

Know all men by these presents, that we, ....., of ....., as principal, and ....., of ....., as surety, are held and firmly bound unto the ..... Company, a corporation duly created and existing under the laws of the state of ....., and its successors and assigns, in the penal sum of \$....., to be paid to said ..... Company, its certain attorney, successors or assigns, for which payment well and truly to be made we bind ourselves and each of us.

In testimony whereof, we have hereunto signed our names and affixed our seals this ..... day of ....., A. D. 19...

Whereas, the above-bounden ..... has been elected treasurer of the said ..... Company, and is about to enter upon the duties of his office as such:

Now, therefore, the condition of this obligation is such that if the above-bounden ..... shall in all respects fully and faithfully discharge his duties as such treasurer so long as he shall occupy or hold said office, whether during the continuance of the term for

which he was originally elected or after the expiration thereof, and shall properly and faithfully account to the said company, and its successors or assigns, for any and all money, property, and chattels of any kind whatsoever for or with which the said ..... may be in any wise accountable to the said company, and also if, in the event of his death, resignation, disqualification, or removal from office for any cause, all the books, papers, accounts, money, and other property of any kind whatsoever in his possession, belonging to or relating to the affairs of said company, shall be forthwith turned over to the said company, then the above obligation is to be void; otherwise to be and remain in full force and effect.

..... [Seal.]

..... [Seal.]

Signed, sealed, and delivered in the presence of

.....

.....

#### § 340. Election of Executive Committee.

If an executive committee is authorized in the charter or by-laws, and the officers composing the same have not been designated, they should now be elected.

#### § 341. Exchanging Stock for Property.

If the stockholders have authorized the board to accept a proposition to receive property in return for the issue of stock, this proposition should be considered, and action taken upon it. If the sense of the board is favorable to its acceptance, the proper officers should be authorized to execute the necessary papers and issue the stock agreed to be paid. The resolution should definitely recite that, in the judgment of the board of directors, the property is of a value equal to that of the stock which is issued in payment for it.<sup>8</sup>

#### § 342. Increasing Stock.

A resolution will also be in order, in accordance with the authority previously given by the stockholders,<sup>9</sup> increasing the

<sup>8</sup> See chapter XIII, §§ 299-302; chapter XIX, § 400.

<sup>9</sup> See chapter XIII, § 303.

stock beyond the amount named in the charter as that with which the company is to commence business, to such amount as may be desired, and, if deemed proper, assessing the stock already subscribed for 100 per cent.

#### § 343. Fixing Form of Stock Certificate.

Inasmuch as the directors, and not the stockholders, are the governing body of the corporation, they should at the first meeting of the board pass upon the form of stock certificate. If the stockholders have previously passed upon this question, their action should be approved by the directors.

#### § 344. Designating Bank.

The bank in which the treasurer is to keep his deposit should be designated by the board of directors. If this is not done, the treasurer would have authority to open an account in any event. But many reasons of policy and a considerable degree of responsibility enter into the selection of the proper bank. It is therefore more to the interest of both directors and treasurer that the board should determine what the depository is to be. The proper form of resolution can generally be obtained from the bank where the deposit is to be made. It should designate who are authorized to draw checks.

#### § 345. Establishing Office, Etc.

The office of the company in the place where the business is to be transacted should be fixed upon at this meeting. Where the statutory agent upon whom process is to be served, and who is to maintain the principal office of the corporation in the parent state, is, under the laws or custom, to be designated by the directors, this designation should be made by formal resolution at this meeting.

#### § 346. Powers of Attorney, Etc.

Where the corporation expects to do business in other states, the statutes of these states should be consulted, to ascer-

tain the conditions upon which foreign corporations are permitted to exercise their functions in such jurisdictions. Frequently certain powers of attorney, statements, etc., must be filed in whatever state the corporation is to conduct its affairs. These powers of attorney and statements should be authorized by the board.

### § 347. Reports, Etc.

The proper officers should also be empowered to file in the parent state the required report, stating the names of officers and directors, the amount of capital stock, etc., as required by statute; also all other statements, reports, etc., required to be filed anywhere. The secretary should be careful to see that these reports are actually filed; otherwise a heavy statutory penalty may be incurred. The forms of these reports vary to such an extent that it would be useless to attempt to insert such a form in this work, especially in view of the fact that printed blanks for this purpose can always be obtained at the office of the Secretary of the State. In this connection attention should be called to the fact that the federal government has prescribed a special excise tax on corporations, and requires an annual return to be made on or before March 1st of each year, setting forth certain data recited in the act.<sup>10</sup> The tax is required to be paid on all net income over and above \$5,000 received from all sources during the year. All corporations mentioned in the act are required to make their annual returns, whether they are in receipt of net incomes liable to the tax or not;<sup>11</sup> and the dissolution of a company while its

<sup>10</sup> *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Act Aug. 5, 1909, c. 6, § 38, 36 U. S. Stat. 112 (U. S. Comp. St. Supp. 1911, p. 946).

<sup>11</sup> *United States v. Military Const. Co.*, 204 Fed. — (Dist. Ct. U. S. Western Dist. Mo.); *United States v. Acorn Roof Co.*, 204 Fed. — (June 22, 1912, U. S. Dist. Ct. Eastern Dist. of N. Y.).

property is in process of liquidation does not relieve it from liability for the federal corporation tax, nor from making returns.<sup>12</sup>

#### § 348. Authorizing Payment, Etc.

It is customary to pass a resolution authorizing the proper officers to procure the necessary books, etc., for the use of the company, and to pay all bills incurred in its organization. Any other matter of business as to which the board desires to give definite instructions to the officers should be transacted at this meeting and entered upon the minutes. The officers should see, for their own protection, that all important matters of policy are considered and determined by the board of directors before they themselves venture to take action with respect to them.

#### § 349. Annual Meetings.

While the above outline of proceedings has been directed principally to the organization meeting of the board of directors, much that has been suggested for this meeting will have to be attended to at the annual meetings also, as, for instance, the election of officers and executive committee, qualification of secretary and treasurer, authorizing powers of attorney, filing of reports, etc. The general principles of corporation law and of common sense will dictate what should be done at the annual meetings of the directors, without further treatment of the subject in this work.

#### § 350. Minutes.

The following may be considered a safe form of minutes for the first meeting of the board of directors:

<sup>12</sup> United States v. General Inspection & Loading Co. (D. C.) 192 Fed. 223.

## MINUTES OF FIRST MEETING OF DIRECTORS.

(To be varied to suit the circumstances of each case.)

The first meeting of the directors of the ..... Company was held at ....., in the city of ....., on the ..... day of ....., A. D. 19.., at the hour of ..... o'clock in the .....noon, pursuant to notice (or pursuant to the waivers appended hereto). The meeting was called to order by Mr. ...., who called for nominations for the office of chairman. Mr. .... was duly nominated and elected to this office. He having assumed the chair, nominations for secretary were called for, pursuant to which Mr. .... was nominated and elected to that position, and assumed the duties thereof.

The following directors were present, constituting a quorum of the board: (Insert names of directors present.)

The call (or waiver of notice) pursuant to which the meeting was convened was then read and ordered spread upon the minutes, and is in the words and figures appended hereto.

The minutes of the first meeting of the incorporators and subscribers to the capital stock were read.

The election of officers was next proceeded with, resulting in the choice of the following gentlemen to serve as officers of the company for the first year of its existence, and until their successors are elected and qualified: President (insert name); vice president (insert name); secretary (insert name); treasurer (insert name).

The salaries of these officers were fixed at the following sums, to take effect (fill in date from which salaries are to commence): President, \$..... per annum; vice president, \$..... per annum; secretary, \$..... per annum; treasurer, \$..... per annum.

(Note.—In case any of these officers are directors, as they usually are, it is well to have the minutes recite that, during the discussion upon the amount of salary to be voted to each officer, the officer whose salary was being considered was absent from the room and took no part in the discussion. Under the laws of the state of West Virginia [Code W. Va. 1899, c. 53, § 53, amended by Acts 1901, c. 35, § 18] any compensation to the president must be voted, not by the directors, but by the stockholders.)

The president thereupon assumed the chair.

The secretary then, pursuant to the motion of Mr. ...., took the written oath in the form appended to these minutes, and entered upon the discharge of his duties.

It was moved by Mr. .... that the treasurer of the com-

pany be required to give bond in the sum of \$..... for the faithful performance of his duties. This motion, being seconded, was unanimously carried. The treasurer thereupon presented a bond signed by himself as principal, and by ..... as surety, which was approved, as to form, execution, and the sufficiency of the sureties, by the board, and the form of same ordered spread upon the minutes.

The following gentlemen were then elected to constitute the executive committee for the first year of the company's existence, and until their successors are elected and qualified, to wit: (Insert names.)

(Note.—The above paragraph is only to be inserted where the members of the executive committee have not been previously designated in the charter or by-laws, or by the stockholders when they are empowered to select the committee.)

On motion of Mr. ...., the following preamble and resolutions were unanimously adopted:

Whereas, a proposition has been received from ....., offering to sell, transfer, and assign to this company the following described property (insert description); the said property to be paid for by full-paid and nonassessable stock of this company, of the par value of one hundred thousand dollars, to be issued to ..... and his assigns; offering, also, in case of the acceptance of said proposition, to donate to the treasury of the company twenty-five thousand dollars of the stock at par to be issued in payment as aforesaid; and

Whereas, by an agreement entered into between the individual incorporators of this company and said ....., the stock to be issued in payment as aforesaid is to include the stock subscribed for by said incorporators; and

Whereas, the incorporators and subscribers to the capital stock of this company, in meeting assembled on the ..... day of ....., 19.., passed a resolution reciting that, in their judgment, the said proposition was fair and reasonable, and that the value of the property offered was equal to that of the stock proposed to be taken in payment therefor, and that such property was necessary to enable the company to properly conduct its affairs, and authorizing and requesting this board, if, in their judgment, it is proper so to do, to accept said proposition and purchase the property above mentioned upon the terms thereof, and to issue stock in payment in accordance with said proposition, and designating ..... and ..... to receive and hold the twenty-five thousand dollars of stock at par to be donated to this company as therein recited, in accordance with the instructions which shall from time to time be given them by this board; and

Whereas, in the judgment of this board the said property is of the fair value of one hundred thousand dollars, and the same is necessary to enable the company to properly conduct its affairs, and the said proposition should be accepted:

Now, therefore, be it resolved that the said proposition be, and is hereby, accepted; and the proper officers of this company are hereby empowered and directed to receive the duly executed transfers and assignments of said property, and to issue in exchange therefor certificates of the capital stock of this company to the par value of one hundred thousand dollars, full-paid and nonassessable, in the name of ....., or of such persons as he may designate in writing to receive the same;

And be it further resolved that an assessment of 100 per cent. be levied upon the shares of stock subscribed by the incorporators, and that the company accept in payment of said subscriptions and assessment the property embraced within the proposition aforesaid;

And be it further resolved that said ..... and ..... are authorized to receive and hold the twenty-five thousand dollars of stock at par to be donated to this company under the terms of said proposition, and directed to hold the same until the further order of this board.

(Note.—If the proposition referred to in the foregoing paragraphs does not include the incorporators' stock, specific authority should be given to the officers to issue the stock to the incorporators.)

Upon motion of Mr. ...., it was unanimously resolved that the proper officers of this company be, and they are hereby, authorized to sell for cash, at par, one hundred thousand dollars of the capital stock of this company, in addition to the amount named in the charter as that with which the company shall commence business.

The form of stock certificates approved and adopted at the initial meeting of incorporators and subscribers to the stock was presented, and the action of said meeting in that regard ratified and approved.

On motion of Mr. ...., the following resolution was unanimously adopted:

Resolved, that the treasurer of this company be, and he is hereby, authorized and directed to open and keep an account, both for deposit and discount, with the ..... Bank in the name of and for the benefit of this company, and to deposit in such bank to its credit from time to time any and all moneys, checks, drafts, notes, acceptances, or other evidences of indebtedness which may now be in his possession or may hereafter come into his custody, and, in the name of this company, to withdraw the same, or any part of the proceeds thereof, by checks signed by both the president and treasurer of this company, and to pledge the credit of this company

as the said president and treasurer may from time to time find necessary or convenient, by means of evidences of indebtedness signed by the two said officers, and for these and all other purposes to sign, indorse, accept, make, execute, and deliver any and all checks, notes, drafts, and bills of exchange.

On motion of Mr. ...., it was resolved that an office of the company be established and maintained at (insert name of place where the company proposes to conduct its business), where meetings of the board of directors may from time to time be held; the passage of this resolution, however, not to prevent the holding of such meetings in the parent state or elsewhere as may be determined by the board of directors.

Upon motion of Mr. ...., it was resolved that the proper officers of this company be, and they are hereby, empowered and directed to execute on its behalf, in such form as may be required by law, and to acknowledge and file, the certificates or statements required by statute to be filed in any jurisdictions in which it may be found necessary to file such certificates or statements in order to authorize the company to transact business therein.

On motion of Mr. ...., the secretary was instructed to have prepared, and the proper officers authorized and directed to execute, acknowledge, and file with the proper state officials in the state of (insert name of parent state), all such statements and reports as may be required to be filed by any law, regulation, or custom in said state.

On motion of Mr. ...., the secretary was instructed to procure the proper books, stationery, and office facilities for the orderly conduct of the business of the company.

On motion of Mr. ...., the treasurer was authorized and instructed to pay from the funds of the company the expense properly incurred in connection with the incorporation and organization of this company.

The secretary was instructed to insert in the minute book, for convenience of reference, copies of the following:

- (1) Waiver of notice of this meeting (copied at page .....).
- (2) Secretary's oath (copied at page .....).
- (3) Treasurer's bond (copied at page .....).
- (4) Report to secretary of state (copied at page .....).

There being no further business, the meeting then adjourned.

.....,  
Secretary.

### § 351. Meeting of Executive Committee.

Where there is an executive committee, the procedure at its meetings may be modeled after that of the directors.

## CHAPTER XVII

## OFFICERS

- § 352. Term of Office.
- 353. Powers.
- 354. Authority to Transfer Property.
- 355. Sale of Entire Stock in Trade.  
Forms of Testimonium Clauses.
- 356. 1. For Deeds.
- 357. 2. Simple Contracts.
- 358. 3. Contracts under Seal.
- 359. 4. Contracts under Seal between Two Corporations.
- 360. Signatures.
- 361. Consequence of Improper.
- 362. Compensation.
- 363. Fiduciary Relations.
- 364. Liabilities.

## § 352. Term of Office.

The directors exercise their powers through the officers of the corporation who are usually appointed by them. The officers so appointed hold their positions during the pleasure of the directors, where the charter or by-laws do not fix the term of office, or the directors do not specify the time.<sup>1</sup> They may be deposed at any time without notice and without trial, unless there is a contract which forbids this.<sup>2</sup>

## § 353. Powers.

The officers, in the absence of some definite restriction in the law, charter, or by-laws, or in the contract under which

<sup>1</sup> Sparks v. President, etc., of Farmers' Bank of Delaware, 3 Del. Ch. 274; South Bay Meadow Dam Co. v. Gray, 30 Me. (17 Shep.) 547; Union Bank of Maryland v. Ridgely, 1 Har. & G. (Md.) 324; Germania Spar & Bau Verein v. Flynn, 92 Wis. 201, 66 N. W. 109.

<sup>2</sup> Adamantine Brick Co. v. Woodruff, MacArthur & M. (D. C.) 318; People ex rel. Stevenson v. Higgins, 15 Ill. (5 Peck) 110; Stobo v. Davis Provision Co., 54 Ill. App. 440.

they are appointed, may perform without specific authority, such acts as are ordinarily by usage or custom, incident to their respective offices.<sup>3</sup> A corporation is liable for the acts and omissions of its agents in their appropriate duties, but not for their acts outside of the scope of their employment.<sup>4</sup> In this respect, however, there is a great difference between the liability of the corporation to a person dealing with it with knowledge of the limitations upon the powers of the officer, and to one who has no knowledge of such limitations. One having no knowledge of limitations upon the officer's authority is warranted in believing that he is duly authorized to perform any duty customarily falling within the scope of his office, and to that extent may hold the corporation responsible as if he were duly authorized.<sup>5</sup> But where knowledge of the lack of authority is brought home to the other contracting party, the corporation is not bound by an unauthorized contract entered into by its agent, even though such a contract is within the ordinary powers of such an official.<sup>6</sup>

<sup>3</sup> *Peck v. New London County Mut. Ins. Co.*, 22 Conn. 575; *Chicago, B. & Q. R. Co. v. Coleman*, 18 Ill. (8 Peck) 297, 68 Am. Dec. 544; *Smith v. Smith*, 62 Ill. 493.

<sup>4</sup> *Bank of Columbia v. Patterson*, 11 U. S. (7 Cranch) 299, 3 L. Ed. 351; *Lewis v. Meier* (C. C.) 14 Fed. 311; *President, etc., of Hartford Bank v. Hart*, 3 Day (Conn.) 491, 3 Am. Dec. 274; *Imeson & Limerick v. Newport & Covington Bridge Co.*, 5 Ky. Law Rep. (abstract) 685; *President, etc., of Salem Bank v. President, etc., of Gloucester Bank*, 17 Mass. 1, 9 Am. Dec. 111; *North Missouri R. Co. v. Winkler*, 33 Mo. 354; *Leggett v. New Jersey Mfg. & Banking Co.*, 1 N. J. Eq. (Saxt.) 541, 23 Am. Dec. 728; *Fulton Bank v. New York & Sharon Canal Co.*, 4 Paige (N. Y.) 127; *Fink v. Canyon Road Co.*, 5 Or. 301; *Silliman v. Fredericksburg, O. & C. R. Co.*, 68 Va. 119.

<sup>5</sup> *Case v. Citizens' Nat. Bank*, 100 U. S. 446, 25 L. Ed. 695; *Home Life Ins. Co. v. Pierce*, 75 Ill. 426; *Madison & I. R. Co. v. Norwich Savings Society*, 24 Ind. 457.

<sup>6</sup> *El Dorado Imp. Co. v. Citizens' Bank*, 85 Ark. 185, 107 S. W. 676; *Hallenbeck v. Powers & Walker Casket Co.*, 117 Mich. 680, 76 N. W. 119; *Kelsey v. New England St. Ry. Co.*, 60 N. J. Eq. 230, 46 Atl. 1059; *Lawyers' Advertising Co. v. Consolidated Ry., Light-*

**§ 354. Authority to Transfer Property.**

A corporation in transferring property must act through its duly accredited agent. The transfer must be made in accordance with law, and this means that the real estate must be conveyed by a properly executed deed and personal estate by a valid bill of sale. Where the property is of any considerable value, the deed should recite the resolutions both of the stockholders and directors authorizing the transfer.<sup>7</sup> In some places it is also necessary that an attorney in fact should be appointed to acknowledge the instrument on behalf of the corporation.<sup>8</sup>

**§ 355. Sale of Entire Stock in Trade.**

Under the sale of merchandise in bulk acts which are in force in many states, among which may be mentioned Minnesota, Indiana, New York, Massachusetts, Connecticut, Virginia, Oregon, Pennsylvania, Michigan, and the District of Columbia, the transfer of the entire stock in trade or of a large portion thereof, otherwise than in the ordinary course of business, is deemed fraudulent and void as against creditors, unless they are first notified of the intention to make such a sale.<sup>9</sup> Such statutes have been held constitutional.<sup>10</sup>

ing & Refrigerating Co., 187 N. Y. 395, 80 N. E. 199; Wall St. Exch. Bldg. Ass'n v. New York & W. Consol. Oil Co. (Sup.) 109 N. Y. Supp. 18.

<sup>7</sup> *Hancock v. Holbrook* (C. C.) 9 Fed. 353; *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa, 437; *State v. Western Irrigating Canal Co.*, 40 Kan. 96, 19 Pac. 349, 10 Am. St. Rep. 166; *Small v. Minneapolis Electro Matrix Co.*, 45 Minn. 264, 47 N. W. 797; *Copeland v. Citizens' Gaslight Co.*, 61 Barb. (N. Y.) 60.

<sup>8</sup> Code of Law D. C. 1901, § 497.

<sup>9</sup> U. S. Senate Report 2436, 58th Cong., 2d Sess.; Act Cong. April 28, 1904, c. 1809, 33 Stat. 555.

<sup>10</sup> *Lemieux v. Young*, 211 U. S. 489, 29 Sup. Ct. 174, 53 L. Ed. 295; *Kidd, Dater & Price Co. v. Musselman Grocer Co.*, 217 U. S. 461, 30 Sup. Ct. 606, 54 L. Ed. 839.

**§ 356. Forms of Testimonium Clauses for Deeds.**

The testimonium clause in common use, consisting of the words, "In witness whereof the said parties have hereunto set their hands and seals this ..... day of ....., A. D. 19....," is not adapted to corporations. A corporation has no hand, and therefore cannot execute an instrument in that way. It may contract under seal or without a seal, depending upon the subject-matter of the contract. The old rule that a corporation can only contract under seal has long since been exploded, and it is now settled that, unless the statute, charter, or by-law directs to the contrary, a corporation need contract under seal only in cases where an individual must do so.<sup>11</sup>

**§ 357. Simple Contract.**

The ordinary testimonium clause for a contract between an individual and a corporation, not under seal, would be as follows:

In witness whereof the said party of the first part has signed these presents, and the said party of the second part has caused its corporate name to be hereunto subscribed by its president this ..... day of ....., A. D. 19...

**§ 358. Contracts under Seal.**

If the same contract is under seal, the testimonium clause may be as follows:

In witness whereof the said party of the first part has hereunto signed his name and affixed his seal, and the said party of the second part has caused its corporate name to be hereunto subscribed by its president, and its corporate seal to be hereunto affixed attested by its secretary, this ..... day of ....., A. D. 19...

<sup>11</sup> Bancroft v. Wilmington Conference Academy, 5 Houst. (Del.) 577; Lee v. Trustees of Flemingsburg, 37 Ky. (7 Dana) 28; Wolf v. Goddard, 9 Watts (Pa.) 544; Bank of Kentucky v. Schuylkill Bank, 1 Pars. Eq. Cas. (Pa.) 180; 10 Cyc. 1004 et seq.

§ 359. **Contracts under Seal between Two Corporations.**

If the two contracting parties are corporations, the testimonium clause may be as follows:

In witness whereof the parties hereto have caused their respective corporate signatures to be hereunto affixed by their respective presidents, and their corporate seals to be attached hereto attested by their respective secretaries, this ..... day of ....., A. D. 19..

§ 360. **Signatures.**

All legal papers requiring execution by or on behalf of a corporation should be executed in the *corporate name*, and not in the name of some officer as such. The signature should be

..... Company,  
By ..... President.

And not

.....,  
Pres. of ..... Company.

§ 361. **Consequence of Improper Signature.**

Should the signature be individual, although followed by the title of the officer making it, as in the last illustration given, there is great danger that the officer so signing would be held individually liable, and would have to seek his redress over against the corporation;<sup>12</sup> whereas a signature in the corporate name does not bind the officer personally, but only the corporation itself.<sup>13</sup> The negotiable instruments law now in force in many of our commercial states crystallizes into statute form a rule of the common law, providing that the mere addition of words describing a party signing as agent or as fill-

<sup>12</sup> Duvall v. Craig, 2 Wheat. 56, 4 L. Ed. 180; Lutz v. Linthicum, 8 Pet. 165, 8 L. Ed. 904; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Western Wheeled Scraper Co. v. McMillen, 71 Neb. 686, 99 N. W. 512; Palmer v. Stephens, 1 Denio (N. Y.) 471; Dusenbury v. Ellis, 3 Johns. Cas. (N. Y.) 70, 2 Am. Dec. 144; McBean v. Morrison, 1 A. K. Marsh. (Ky.) 545.

<sup>13</sup> 2 Cook, Corp. § 1022, and cases cited; 10 Cyc. 1036 et seq.

ing a representative capacity, without disclosing his principal, does not exempt him from personal liability.<sup>14</sup>

### § 362. Compensation.

Where there is no contract on the subject, the general rule is that an officer is entitled to the reasonable value of his services as performed.<sup>15</sup> Where there is a contract, and the officer performs his duties in accordance therewith, of course, the law allows him the sum agreed upon.

### § 363. Fiduciary Relations.

An officer owes to the corporation employing him fidelity and entire lack of duplicity. He cannot engage in any business in which his interests are likely to come into conflict with those of the corporation he represents.<sup>16</sup>

### § 364. Liabilities.

An officer is liable for any breach of duty. He may be liable criminally to the state,<sup>17</sup> or civilly either to the corporation, its stockholders, or its creditors. He may be liable where he perpetrates or participates in fraudulent acts, for unlawful conversion of property, for trespass, for knowingly infringing a patent or trade-mark, for personal injuries to employes or

<sup>14</sup> Code of Law D. C. 1901, § 1323.

<sup>15</sup> *Bee v. San Francisco & H. B. R. Co.*, 46 Cal. 248; *Holder v. Lafayette, B. & M. Ry. Co.*, 71 Ill. 106, 22 Am. Rep. 89; *First Nat. Bank of Ft. Scott v. Drake*, 29 Kan. 311, 44 Am. Rep. 646; *McCracken v. Halsey Fire Engine Co.*, 57 Mich. 361, 24 N. W. 104.

<sup>16</sup> *Wardell v. Union Pac. R. Co.*, Fed. Cas. No. 17,164, 4 Dill. 330, affirmed in 103 U. S. 651, 26 L. Ed. 509; *Blair Town Lot & Land Co. v. Walker*, 50 Iowa, 376; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Smith v. Wilson*, 1 Tex. Civ. App. 115, 20 S. W. 1119.

<sup>17</sup> *People v. Leonard*, 103 Cal. 200, 37 Pac. 222; *Partridge v. United States*, 41 Wash. Law Rep. (D. C.) 99; *Commonwealth v. Dunham, Thacher*, Cr. Cas. (Mass.) 538.

third persons, for libel, or for negligence generally.<sup>18</sup> It therefore behooves the officers to familiarize themselves with the laws of the land, in so far as they bear upon their respective duties, as well as with the rules, regulations, and by-laws of the company whose agents they are. Where the law conflicts with the directions received by the officer from his superiors, he is bound to obey the law rather than those in authority over him in his company. If he fails in this duty, he becomes personally liable.<sup>19</sup>

<sup>18</sup> St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. (9 Peck) 353; Widrig v. Newport St. Ry. Co., 82 Ky. 511; Wines v. Crosby & Co., 169 Mich. 210, 135 N. W. 96, 39 L. R. A. (N. S.) 901; First Nat. Bank of Merrill v. Harper, 61 Minn. 375, 63 N. W. 1079; Nunnelly v. Southern Iron Co., 94 Tenn. (10 Pickle) 397, 29 S. W. 361, 28 L. R. A. 421.

<sup>19</sup> Peck v. Cooper, 112 Ill. 192, 54 Am. Rep. 231.

## CHAPTER XVIII

## ISSUE OF STOCK

## § 365. Definitions.

- 366. 1. Common Stock.
- 367. 2. Preferred Stock.
- 368. 3. Full-Paid Stock.
- 369. 4. Issued and Outstanding Stock.
- 370. 5. Unissued Stock.
- 371. 6. Overissued Stock.
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- 373. 8. Watered Stock.
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- 381. Forms.
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- 384. Signatures.
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- 386. Liability.
- 388. Stubs.
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- 397. Rules.

## § 365. Definitions.

The issue of stock is next to be considered. In order that there may be a complete understanding of the terms in ordinary use to designate the different classes of stock, certain definitions may not be amiss at this point.

§ 366. **Common Stock.**

**Common Stock** is that stock "which entitles the owners of it to an equal pro rata division of profits, if any there be; one stockholder or class of stockholders having no advantage, priority, or preference over any other shareholder or class of stockholders in the division."<sup>1</sup>

§ 367. **Preferred Stock.**

**Preferred Stock** is stock which entitles the holder to certain privileges, the nature of which will be treated more fully hereafter.<sup>2</sup>

§ 368. **Full-Paid Stock.**

**Full-Paid Stock** is stock for which payment in full has been made either in cash, property, or services, in good faith and without fraud.<sup>3</sup>

§ 369. **Issued and Outstanding Stock.**

**Issued and Outstanding Stock** is that which has been bought and fully paid for, and to which somebody other than the corporation itself is entitled without further consideration.<sup>4</sup>

§ 370. **Unissued Stock.**

**Unissued Stock** is stock the issue of which has been authorized, but rights in which no person has yet acquired.<sup>5</sup>

<sup>1</sup> 1 Cook, Corp. § 12.

<sup>2</sup> *Infra*, §§ 374-380.

<sup>3</sup> *Brant v. Ehlen*, 59 Md. 1; *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432.

<sup>4</sup> *Fulgam v. Macon & B. R. Co.*, 44 Ga. 597; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

<sup>5</sup> *Gillett v. Bate*, 86 N. Y. 87; *Reese v. Bank of Montgomery County*, 31 Pa. (7 Casey) 78, 72 Am. Dec. 726. See chapter IX, § 144.

§ 371. **Overissued Stock.**

**Overissued Stock** is stock "issued in excess of the full amount of capital stock authorized by the charter of the corporation. Such stock is void, even though issued in good faith."<sup>6</sup>

§ 372. **Treasury Stock.**

**Treasury Stock** is stock which has once been issued as full paid and nonassessable, and which has come back into the possession of the company by donation or otherwise. It can then be sold below par, if deemed desirable.<sup>7</sup>

§ 373. **Watered Stock.**

**Watered Stock** is stock issued or authorized by the corporation to be issued without an asset behind it for its full value.<sup>8</sup>

§ 374. **Preferred Stock.**

The principles governing this class of stock have been stated so succinctly by the vice-chancellor of the state of New Jersey in the case of *Elkins v. Camden & A. R. Co.*, 36 N. J. Eq. 233, 236, that the following extracts from his opinion are here quoted in full.

§ 375. **Principles Governing.**

"There are certain legal principles pertinent to this discussion which I think are so firmly established that they may be taken for granted, without argument or the citation of au-

<sup>6</sup> *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599, 11 N. Y. Super. Ct. (4 Duer) 570, reversing 11 N. Y. Super. Ct. (4 Duer) 480; 1 *Cook, Corp.* § 12.

<sup>7</sup> *Camden Land Co. v. Lewis*, 101 Me. 78, 63 Atl. 523. See chapter XIII, § 301.

<sup>8</sup> 1 *Cook, Corp.* § 28.

thorities: First, stockholders are not creditors, and until the winding up of the corporation are entitled to nothing from it but a distribution of its net earnings; second, dividends can only be paid out of profits; third, calling stock preferred stock does not, per se, define the rights of such stock, but in order to determine in what respect the holder of such stock is to be preferred to the holder of ordinary stock, resort must be had to the statute or contract under which it is issued; and, fourth, where the statute or contract under which preferred stock is issued declares or promises that the holder of such stock shall receive a dividend of a fixed and certain rate per annum, without limiting the annual sum to be paid as a dividend to profits earned or made within a designated period, as, for example, that he should receive a dividend of 7 per cent. per annum before any dividend shall be paid on the ordinary stock, there the preferred stockholder is entitled to 7 per cent. per annum from the date of the issuing of the stock held by him, whether profits sufficient to pay him each year are made or not; and if, at the first division of profits, sufficient shall not have been made to pay him the whole sum due, he may carry the arrears due him over to the next dividend, and continue to do so until he has received the whole sum due him, calculated at 7 per cent. per annum from the date of the issue of the stock held by him."<sup>9</sup>

§ 376. At the same time the reader should be cautioned that the authorities are not harmonious in holding that dividends on preferred stock are cumulative, where nothing is said on the subject. The part of prudence would dictate that, if the dividends are intended to be cumulative, that fact should be so stated in the certificate.<sup>10</sup>

<sup>9</sup> Boardman v. Lake Shore & M. S. Ry. Co., 84 N. Y. 157; Fidelity Trust Co. v. Lehigh Valley R. Co., 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613.

<sup>10</sup> Hazeltine v. Belfast & M. L. R. Co., 79 Me. 411, 10 Atl. 328, 1 Am. St. Rep. 330; Elkins v. Camden & A. R. Co., 36 N. J. Eq. 233; Staples v. Eastman Photographic Materials Co. (1896) 2 Ch. Div. 503; 2 Clark & M. Corp. § 529; 10 Cyc. 573, and note.

**§ 377. Stating Preferences.**

Preferred stock may entitle the holder to such preferences as may be specified, either as to drawing dividends, preferential voting powers, privileges upon dissolution, or what not. Sometimes the certificates of stock are issued and marked "Preferred" without the preferences appearing upon their face. Unless there is some statute, charter provision, by-law, or resolution to which the purchaser of this stock can resort to ascertain his rights, the preference is meaningless.<sup>11</sup> Two or more classes of preferred stock may be created by the same corporation, each drawing a different percentage of dividend, one class to draw the entire dividend limited before the other draws anything. Inasmuch as the different classes of preferences may be numberless, great care should be taken in explicitly defining the rights of the holders of this kind of stock, and these rights should be recited in the certificate itself.<sup>12</sup> Frequently the holders of preferred stock are deprived of the voting power, a wise precaution in certain cases, but one which may materially interfere with the salability of the stock.

**§ 378. Classes of Preferences.**

In general, there may be said to be three classes of preferred stock with regard to dividends: First, the preferred stock may draw dividends at the rate stated, the common stock receiving the entire balance of the dividends declared during the year, in which case the common stock is sometimes more valuable than the preferred stock; second, the preferred stock may receive dividends at the rate stated, then the common stock receive dividends at the same rate, after which all other funds set aside for dividends are to be divided equally between the two classes of stock; third, the preferred stock may receive divi-

<sup>11</sup> *Kidd v. Puritana Cereal Food Co.*, 145 Mo. App. 502, 122 S. W. 784. See *supra*, chapter XIII, § 306.

<sup>12</sup> *Dill*, N. J. Corp. 42.

dends at the rate stated, and then share equally with the common stock in all other funds set aside for dividends.<sup>13</sup>

### § 379. Rights of Holders of Preferred Stock in Surplus Profits.

In the case of *Sternbergh v. Brock*,<sup>14</sup> where the question was raised as to the right of the holders of preferred stock to participate in the surplus profits after the preferred dividend and an equal dividend on the common stock had been paid, it was held that, in the absence of any stipulation otherwise, the holders of preferred and common stock should divide these profits equally.<sup>15</sup> The Maryland courts appear to have reached exactly the opposite conclusion in a case in which practically the same question was raised.<sup>16</sup> In the case last referred to the decision was based apparently upon the idea that the investing public assume and understand that preferred stock is limited to its specific dividend, when there is no express provision one way or the other. Commenting on these two decisions, the *American Law Register* says: "It would seem, on principle, that the decision of the Pennsylvania case is the sounder one. A share of stock is a share of stock, whether preferred, or common, and there is nothing in the word 'preferred' which restricts or cuts down the rights which at common law are inherent in all stock. It is certainly settled law that on dissolution, unless there is some law or regulation to the contrary,<sup>17</sup> holders of both preferred and common stock

<sup>13</sup> *Bailey v. Hannibal & St. J. R. Co.*, Fed. Cas. No. 736, 1 Dill. 174, affirmed in 84 U. S. (17 Wall.) 96, 21 L. Ed. 611; *Belfast & M. L. R. Co. v. Belfast*, 77 Me. 445, 1 Atl. 362; *Williston v. Michigan S. & N. I. R. Co.*, 95 Mass. (13 Allen) 400; *Jermain v. Lake Shore & M. S. R. Co.*, 91 N. Y. 483.

<sup>14</sup> 225 Pa. 279, 74 Atl. 166, 24 L. R. A. (N. S.) 1078, 133 Am. St. Rep. 877.

<sup>15</sup> See, also, *Fidelity Trust Co. v. Lehigh Valley R. Co.*, 215 Pa. 610, 64 Atl. 829, 7 Ann. Cas. 613.

<sup>16</sup> *Scott v. Baltimore & O. R. Co.*, 93 Md. 475, 49 Atl. 327.

<sup>17</sup> *Dill, N. J. Corp.* 43.

share without distinction in the surplus assets after payment of the debts.<sup>18</sup> Why should not the same rule be applied in the distribution of assets before dissolution?"

### § 380. Voting Privileges on Preferred Stock.

Frequently state statutes permit the incorporators to insert in their certificates of incorporation any regulations or restrictions governing the internal management of the company.<sup>19</sup> Under such statutes many thousands of corporations have been organized denying to the holders of preferred stock the voting power.<sup>20</sup> Such a restriction has been held valid in Delaware.<sup>21</sup>

### § 381. Forms.

Forms of both common and preferred stock are here appended.

### § 382. Common Stock.

Number..... Par Value \$..... Each..... Shares  
 The ..... Company.  
 Incorporated under the Laws of the State of .....  
 Preferred Stock, \$..... Common Stock, \$.....  
 Full Paid and Nonassessable.

This is to certify that ..... is the registered owner of..... shares of the *common* stock of this company, transferable only on the books of the company by the said owner in person or by duly authorized attorney upon surrender of this certificate properly endorsed.

Witness the seal of the company and the signatures of its president and secretary this ..... day of ....., A. D. 19...

(Corporate Seal.) .....  
 Attest: ....., President.  
 Secretary.

<sup>18</sup> Gordon's Ex'rs v. Richmond, F. & P. R. Co., 78 Va. 501.

<sup>19</sup> See chapter X, § 185.

<sup>20</sup> Dill, N. J. Corp. 43.

<sup>21</sup> State ex rel. Richards v. Brooks (Super. Ct. Del. Newcastle County, 1909) 74 Atl. 37.

## § 383. Preferred Stock.

Number ..... Shares.

Par Value \$..... Each.

The ..... Company.

Incorporated under the Laws of the State of .....

Capital Stock, \$.....

Preferred Stock, \$..... Common Stock, \$.....

Full Paid and Nonassessable.

This is to certify that ..... is the registered owner of ..... shares of the *preferred* capital stock of the ..... Company, transferable only on the books of the company by said owner in person, or by his duly authorized attorney, upon surrender of this certificate properly indorsed.

This stock is part of an issue amounting in all to \$..... par value, authorized by the certificate of incorporation of the company filed in (insert name of office where certificate is filed), on the ..... day of ....., A. D. 19...

The owners of this preferred stock are entitled to receive and the company is bound to pay out of its surplus or net earnings a dividend at the rate of but never exceeding ..... per cent. per annum, cumulative from and after the ..... day of ....., A. D. 19.., payable quarterly, before any dividend shall be set apart or paid on the common stock.

This preferred stock may, by vote of a majority of the board of directors, be redeemed at any time after three years from the ..... day of ....., A. D. 19.., at the price of \$..... per share and any accumulated dividends.

In case of liquidation or dissolution or distribution of the assets of this company, the owners of this preferred stock shall be paid the par value of their preferred shares, and the amount of dividends accumulated and unpaid thereon, before any amount shall be distributed among the owners of the common stock, and after the payment of the par value of the common stock to the owners thereof the balance of the assets and funds shall be distributed ratably among all the stockholders without preference.

Witness the seal of the company and signatures of its president and secretary this ..... day of ....., A. D. 19...

(Corporate Seal.)

.....,  
President.

Attest: .....,

Secretary.

(Note.—The above form of certificate of preferred stock will be varied to suit the particular terms of preference. Sometimes the (256)

nature and extent of the preferences are also stated in the certificates for common stock. This is a convenient method of notifying the common stock holders of the rights which take precedence over theirs.)<sup>22</sup>

### § 384. Signatures.

The certificates are generally signed by the president and secretary or treasurer, and the officers who should sign these certificates are usually designated by the laws of the state or in the by-laws of the corporation. Certificates for stock should also be under the seal of the corporation,<sup>23</sup> although the omission of the seal will not render the stock invalid.<sup>24</sup>

### § 385. Registrar.

The certificates of stock in large corporations are also frequently signed by a trust company as registrar and transfer agent. This is because there has been a growing public demand for some guaranty of responsibility in the issue and transfer of stock. Indeed, the New York Stock Exchange has for many years past refused to list stock of any corporation whose certificates have not been registered with some responsible trust company or other suitable agency.

### § 386. Liability of Registrar.

It has been quite usual for these trust companies to endeavor to shirk any responsibility for an illegal issue or transfer by claiming the right to merely follow without inquiry the directions given them by the corporation issuing the stock. On the other hand, the corporations themselves have sought to avoid

<sup>22</sup> See Rules for Listing on N. Y. Stock Exchange, § 397; *infra*.

<sup>23</sup> *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894; *Willis v. Fry*, 13 Phila. (Pa.) 33, 36 Leg. Int. (Pa.) 47.

<sup>24</sup> *Halstead v. Dodge*, 1 How. Prac. N. S. (N. Y.) 170, 51 N. Y. Super. Ct. 169.

responsibility in the matter by claiming to rely upon the trust company to exercise care and judgment before issuing the stock or making the transfer. In view of this apparently divided responsibility, the public sometimes suffers more than if a registered agent had not intervened between it and the corporation whose stock is in question. It has been held in a series of well-considered cases that where the registrar fraudulently and criminally permits an overissue of stock the corporation issuing it would be liable to a bona fide holder for value, upon the ground that the registrar was the agent of the corporation, and, on a familiar principle of the law of agency, the principal would be bound.<sup>25</sup>

§ 387. Whether the trust company would itself, under these circumstances, be liable to a bona fide holder for value is an open question, and one upon which the decisions of the courts have not thrown much light. It would seem that, inasmuch as the object of having a registrar is to give the public an additional guaranty of the regularity of the issue of stock, if the registrar signs certificates in this capacity, knowing that the public is looking to it to see that the requirements of the law have been observed in its issue, it should be held liable for neglect in the performance of this duty.<sup>26</sup> Certainly if the word "countersigned" is used by the registrar it would be liable, for the reason that "to countersign an instrument is to sign what has already been signed by a superior, to authenticate by the additional signature." When, therefore, the registrar

<sup>25</sup> *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Fifth Avenue Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 33 N. E. 378, 33 Am. St. Rep. 712, 19 L. R. A. 331; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 43 N. E. 68, 51 Am. St. Rep. 727, 31 L. R. A. 776.

<sup>26</sup> *Windram v. French*, 151 Mass. 547, 24 N. E. 914, 8 L. R. A. 750; *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 43 N. E. 68, 51 Am. St. Rep. 727, 31 L. R. A. 776.

countersigns and seals a certificate of stock, and puts it in circulation, it declares in the most formal manner that the certificate has been properly executed by the corporation, and that every essential requirement of law and of the by-laws has been carried out to make it the binding act of the company.<sup>27</sup>

### § 388. Stubs.

Stock certificates are usually printed in bound books similar to bank check books, containing stubs upon which certain useful information with regard to each certificate issued may be entered. It will be found convenient to keep these stubs carefully and accurately; and when the certificates are returned for cancellation or transfer they are commonly pasted to the stubs to which they were originally attached, being indelibly marked "Canceled" across their face, so that they may not by any accident subsequently come into the possession of a bona fide holder.

### § 389. Transfer of Stock.<sup>28</sup>

The form of transfer, which is usually printed on the back of the stock certificate, will be found set forth in section 437 in the chapter on "Transfer of Stock."

### § 390. When Stock Certificates may be Issued.

Stock should not be issued until it has been paid for in full. Meanwhile the subscriber is entitled to receive from the treasurer or secretary a receipt for the payments made, which receipt may be transferable if so desired.

<sup>27</sup> Fifth Avenue Bank of New York v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 N. E. 378, 19 L. R. A. 331, 33 Am. St. Rep. 712; note, 31 L. R. A. 776.

<sup>28</sup> State ex rel. Townsend v. McIver, 2 S. C. 25.

§ 391. The following is a form much in use:

FORM OF INSTALLMENT CERTIFICATE.

Number .....

10 Shares

Par Value \$100 Each.

The ..... Company.

Incorporated Under the Laws of the State of .....

Preferred Stock, \$.....

Common Stock, \$.....

\$200.

New York City, ....., 1904.

This is to certify that ....., who is a subscriber for ten shares of the preferred capital stock of the ..... Company at par, has paid into the treasury of the company on account of his said subscription \$20 per share. Upon payment of the remaining installments of said subscription and surrender of this certificate, accompanied by evidence that the remaining installments of said subscription have been paid, duly executed stock certificates for said ten shares will be issued to the said ..... or his assigns.

This certificate is transferable, and all the rights of the owner thereof shall pass by duly executed assignment to his assignee.

.....,

Secretary.

.....,

President.

§ 392. As further payments are made they may either be indorsed on the above certificate, or be evidenced by new receipts for each additional payment. On the back of these certificates may appear the following form of transfer:

§ 393. Assignment of Installment Certificates.

For value received I hereby sell, transfer, and assign to ....., of ....., all my right, title, and interest in and to the shares of stock referred to in the within certificate, together with the payments made thereon; and I do hereby authorize and direct the proper officers of the ..... Company, upon payment in full being made for said shares under the terms of my subscription, to issue a certificate or certificates for said stock to the order of my said assignee.

Dated .....

Witness: .....

§ 394. Stock Ledger.

The object of this book is to enable the officer responsible for the issue of stock to see at any moment the exact amount

of stock outstanding in the name of any particular person. This is done by crediting the stockholder with the number of shares issued or transferred to him, and when he parts with any portion of his holdings, by debiting his account with the number of shares transferred. The balance can be readily struck, and will show the number of shares to the credit of the stockholder. Without some such book as this, a great deal of confusion is likely to ensue in the stock accounts, and over-issues may result.

### § 395. Form of Stock Ledger.

NAME ..... ADDRESS .....

Date of Transfer of Shares by the above named Transfer No.	To Whom Shares are Transferred	Leger Folio	Certifi- cates Sur- rendered		Date of Acquisi- tion of Shares	From Whom Shares Were Transferred  (If original issue enter as such)	Leger Folio	Certifi- cates Issued		Balance remain- ing Cr. of above
			Certif. Nos.	No. Shares				Certif. Nos.	No. Shares	

### § 396. Listing Securities on New York Stock Exchange.

In order to list a security for sale upon the New York Stock Exchange, compliance with the following rules are insisted upon by that Exchange.

### § 397. Rules for Listing.

#### COMMITTEE ON STOCK LIST.

#### NEW YORK STOCK EXCHANGE.

July 1, 1912.

This Committee will meet on Mondays at 3:30 p. m.

An application signed by an executive officer of a corporation must be filed with the Secretary of the Stock Exchange, and on notice six additional printed or typewritten copies must be filed on or before the Wednesday prior to date set for consideration.

Every application must be accompanied by a check for fifty dol-

lars for each \$1,000,000, or portion thereof, of the par value of each class of security. Checks should be drawn to the order of "Treasurer of the New York Stock Exchange."

#### REQUIREMENTS FOR ORIGINAL LISTINGS.

##### *Railroad Corporations.*

Application for an original listing of the capital stock of railroad corporations shall recite the title of the corporation, date of organization and authority for same; special rights or privileges under charter; amount of capital stock authorized, issued, and applied for; par value; rate of dividend; voting power; whether capital stock is full paid and nonassessable; whether personal liability attaches to ownership; whether preferred stock authorized, whether cumulative or noncumulative; preference as to dividends and distribution of assets; location and route of road; description of property and total mileage in operation; contemplated extensions; total equipment; amount of mortgage lien, amount of other indebtedness or liability, jointly or severally, for leases, guarantees, rentals and car trusts, and terms of payment thereof; distribution of securities; application of proceeds; income account for one year and balance sheet of recent date; name and location of transfer agent and registrar; address of main office of corporation; list of officers and directors (classified); date and place of annual meeting; end of fiscal year.

Application for bonds shall recite in addition the full title; denominations; amount authorized, outstanding, applied for, with numbers, and authority for issue; date and maturity; rates of interest, when and where payable; distribution; names of trustees; redemption by sinking fund or otherwise; terms of exchange or convertibility into other securities; whether issued only in coupon form, registerable as to principal, or fully registered, or both, and if the latter, whether interchangeable; purposes of issue and application of proceeds; terms of issue of additional amounts; trustees' obligation to declare principal and interest due and payable in event of default, and restrictions or limitations of unusual character; a tabulated list of properties owned, leased and operated, showing those covered by the mortgage or other indenture under which the bonds are issued; those covered by prior liens; indebtedness of leased companies or companies controlled by ownership of bonds and stocks, and the amount of such bonds and stocks owned, authorized, issued, assumed, guaranteed, or deposited as collateral.

If bonds are convertible into stock, file certified copy of the ac-

tion of stockholders and directors authorizing issue and reservation of stock to be held specifically for such conversion.

When bonds are issued to replace other liens, *the Committee will require evidence of the satisfaction of such liens, or a certificate of trustee that prior lien bonds are held under the terms of the mortgage or indenture.*

A copy of the mortgage or indenture must be furnished, including a certificate from the county clerk in each county in which the mortgaged property is located, that the mortgage or indenture has been recorded in such county. Should the laws of the state not require a record to be made in the several counties, a copy of certificate of the Secretary of the State, showing the legal record, shall be filed with the copy of mortgage or indenture. *This copy must be certified by the trustee to be a true copy.*

When a mortgage or indenture provides that bonds may be issued interchangeably in coupon and registered form, each registered bond issued thereunder shall bear a legend reciting the number or numbers of the coupon bond or bonds reserved for exchange of such registered bond in substantially the following form:

The within bond is issued in lieu of or in exchange for (a) coupon bond(s), numbered ..... for \$1,000 (each, none of) which bond(s) is (not) contemporaneously outstanding, and (a) coupon bond(s) bearing the said serial number(s) will be issued in exchange for this bond upon its surrender and cancellation.

A registered bond not interchangeable shall bear the following:

The within bond is issued in lieu of or in exchange for (a) coupon bond(s), numbered ..... for \$1,000 (each, none of) which bond(s) is (not) contemporaneously outstanding.

*The Committee recommends that, when fully registered bonds are to be issued, they shall be made interchangeable with coupon bonds.*

When mortgages or indentures provide for the issuance of coupon bonds of the denomination of 100 dollars, the Committee recommends that any ten such bonds be exchangeable into coupon bonds for 1,000 dollars each, and that each unit consisting of ten 100 dollar bonds bear a number together with an affix letter (A to J) representing a 1,000 dollar bond reserved for exchange, and that each 100 dollar bond bear the following legend:

For this bond and nine other bonds of the same denomination and serial number, bearing affixed letters A to J, a coupon bond for \$1,000 is held in reserve and is not contemporaneously outstanding, and on the surrender and cancellation of ten \$100 bonds of said series a coupon bond for \$1,000 will be issued in exchange therefor bearing the lowest serial number reserved for such purpose.

When bonds are to be denominated in foreign moneys, the Committee recommends that the standard of value in United States gold coin be stated, and that the text of all such bonds be in the English language with the foreign text in a parallel column. The English text shall govern the interpretation in all such issues.

*Corporations Other Than Railroads.*

Application for an original listing of securities of corporations other than railroads shall recite the title of the corporation, date of organization and authority for same; amount of capital stock authorized, issued and applied for; par value; rate of dividend; voting power; whether capital stock is full paid and nonassessable; whether personal liability attaches to ownership; whether preferred stock is authorized, whether cumulative or noncumulative; preference as to dividends and distribution of assets, and redemption; whether an original organization or a consolidation of several previously existing firms or corporations; if a consolidation, a concise history of its organization, and the names and locations of constituent companies owned in entirety or otherwise, and amounts of authorized, issued and owned stocks of same; full description of the property, real, personal and leased; real estate owned in fee, acreage and location, and the character of buildings thereon; nature and character of product; business to be transacted; duration of charter and charters of subsidiary companies; special rights and privileges conveyed to the corporation under its charter, or to directors under by-laws; income account for one year and balance sheet of recent date; name and location of transfer agent and registrar; address of main office of corporation; list of officers and directors (classified); date and place of annual meeting; end of fiscal year.

For bond listings the requirements are substantially the same as for bonds of railroad corporations.\*

*Mining Corporations.*

Application to list securities of mining corporations shall recite details of original organization and authorized capitalization; amount of shares outstanding, amount applied for, amount of shares remaining unissued, and options or contracts on such shares; whether capital stock is full paid and nonassessable; par value; voting

\* Page 262.

power; whether personal liability attaches to ownership; whether preferred stock is authorized, whether cumulative or noncumulative; preference as to dividends and distribution of assets, and redemption; bonded indebtedness, if any, with date of issue, maturity and rate of interest; list and numbers of patented and unpatented claims; full description of mineral and other lands, leases and water rights, smelting and concentrating plants, timber and fuel supply, owned or controlled; a geological description of the country in which the mines are located showing the character of the ore produced, the proper method of treatment, a description of the ore bodies, average values, and probabilities on further exploration.

A history of the property giving prior workings of mine, results obtained and production each year, with statement of receipts and expenditures, and disposition of income; location of mines and proximity to railway or other common carrier; cost of mining, transportation, milling or smelting; balance sheet showing assets and liabilities; if a mining development and an income account not available, guarantee of an amount to complete development and afford working capital; statement of ore reserves compared with reserves of previous years and an estimate by a competent mining expert of the probable life of the mine; a balance sheet of all companies owned or controlled by stock ownership or otherwise; name and location of transfer agent and registrar; address of main office of corporation; list of officers and directors (classified); date and place of annual meeting; end of fiscal year.

For bond listings the requirements are substantially the same as for bonds of railroad corporations.†

#### *Reorganized Corporations.*

Application to list securities of a corporation, which has been insolvent, or has been reorganized, shall recite a concise history of the corporation, and of its predecessor, with a statement of the reason for its reorganization; history of proceedings if property was sold under foreclosure; description and amount of all securities authorized, issued and applied for by the new corporation; tabulated statement of securities issued in lieu of, or exchanged for any of the preceding issues; purposes and terms in detail under which additional securities of the reorganized corporation may be issued; amount and description of the various securities which have been retired, canceled, deposited, or otherwise held, or are still

† Page 262.

outstanding; income account of the predecessor corporation for a period of at least one year prior to reorganization, and final balance sheet; also a balance sheet of the new corporation at date of reorganization; income account for one year and balance sheet of recent date; name and location of transfer agent and registrar; address of main office of corporation; list of officers and directors (classified); date and place of annual meeting; end of fiscal year.

#### *Certificates of Deposit in Trust.*

Institutions, firms, corporations, depositaries of securities under plans of reorganization, protective or associate action or voting trusts, are requested to accept on deposit *only such securities as are a delivery on the Stock Exchange*; provided, that in any case where said depositaries find it necessary to accept securities which are not a delivery, they shall issue therefor a *distinctive certificate* which will indicate the irregularity. Agreements for deposit of securities for protective or associate action must be limited to a specified time for continuance, within which a plan of reorganization or adjustment will be presented to the certificate holders for acceptance, or in default thereof such holders will be granted opportunity to withdraw the securities represented by their certificates, and terminate their agreement. Penalty for delay in depositing securities under any agreement should not be imposed until all holders of such securities have had reasonable opportunity for depositing, after the listing of the certificates of deposit.

Certificates of deposit will be considered as representing the deposit of *coupon, registered, or interchangeable registered bonds. Certificates issued for deposit of noninterchangeable registered bonds or bonds not a delivery on the Stock Exchange must bear on their face evidence of such fact.* Certificates of deposit for securities, whether for reorganization, protective or associate action, or for voting trusts, must bear the countersignature of some institution as registrar in same manner as certificates for stock.

#### *Additional Amounts of Listed Securities.*

Application to list additional amounts of listed securities shall refer to previous applications by number; state character and amount of additional issues and amounts applied for; whether issued for cash, property, or otherwise; distribution; application of proceeds; amount, description and disposition of securities exchanged for new issues; additional property acquired and present

physical condition; furnish income account and balance sheet of recent date; attested copy of resolutions of stockholders and action of directors as to issuance of the additional securities, and opinion of counsel as to validity of issue; trustee's certificate of issue of additional bonds under terms of the mortgage or indenture; certificate from the Secretary of State or other authority for increase in capitalization.

*Thirty days' notice of any proposed increase in the authorized capital stock of a corporation shall be given to the Stock Exchange before such increase shall be eligible for listing.*

*The registrar shall not register any listed stock until authorized by this Committee.*

When the capital stock of a corporation is increased through conversion of bonds, already listed, the issuing corporation shall give immediate notice to the Stock Exchange, and this Committee may thereupon add said stock to the list and authorize its registration.

*Papers to be Filed with Applications.*

**For listing stocks:**

Seven copies of the charter or articles of incorporation, one copy to be attested by the Secretary of State in which the corporation is incorporated.

Seven copies of by-laws, one copy to be attested by secretary of corporation.

Seven copies of leases and special agreements, one copy of each to be attested by the secretary of the corporation.

One copy of resolutions of stockholders authorizing issue and of the action of the directors thereunder, each attested by secretary of the corporation.

Opinion of counsel (not an officer or director of the corporation) as to legality of authorization and issue of securities.

Certificate of proper authority for issue.

Certificate of registrar as to amount of securities registered at date of application.

Report of a duly qualified engineer covering the actual physical condition of the property as of recent date.

Map of the property and contemplated extensions.

Specimens of all securities applied for.

**In addition to the foregoing, for listing bonds:**

Six additional copies of the mortgage or indenture.

Opinion of counsel shall cover—

*a* as to organization,

*b* as to validity of issue.

Trustees' certificate shall cover—

*a* as to acceptance,

*b* as to issuance under the terms of the mortgage or indenture with numbers and amount of bonds issued,

*c* as to securities held,

*d* as to cancellation or cremation or deposit of underlying securities, prior liens, etc,

Also, with applications for reorganized corporations:

Certified copies of legal proceedings and order of court confirming sale, or other authority for reorganization.

Certified copy of plan of reorganization.

Opinion of counsel that the proceedings have been in conformity with legal requirements, that the title to the property is vested in the new corporation, and is free and clear from all liens and incumbrances, except as distinctly specified.

Certificate of cancellation, deposit, or holding of prior issues.

Certified copies of all mortgages or indentures.

### *Agreements.*

Every corporation applying to list securities must agree:

That it will not dispose of its interest in any constituent company, or allow any of said companies to dispose of its interests in other companies, except on direct authorization of stockholders of the holding company.

To publish at least once in each year and submit to the stockholders, at least fifteen days in advance of the annual meeting of the corporation, a detailed statement of its physical and financial condition, an income account covering the previous fiscal year, and a balance sheet showing assets and liabilities at the end of the year; also annually an income account and balance sheet of all subsidiary companies;

To maintain a transfer office or agency in the borough of Manhattan, city of New York, where all securities shall be directly transferable, and the principal of all securities with interest or dividends thereon shall be payable;

To give at least 10 days' notice in advance of the closing of the books or the taking of a record of stockholders for any purpose. *The Committee recommends that a date be fixed as record for dividends, allotment of rights and stockholders meetings, without an extended closing of the transfer books.*

To notify the Stock Exchange in the event of the issuance of any rights or subscriptions to or allotments of its securities and afford the holders of listed securities a proper period within which to record their interests, and that all rights, subscriptions or allotments shall be transferable, payable and deliverable in the borough of Manhattan, city of New York.

### *Removals or Suspensions in Dealings of Listed Securities.*

Whenever it shall appear that the outstanding amount of any security listed upon the Stock Exchange has become so reduced as to

make inadvisable further dealings therein, this Committee may direct that such security be taken from the list and further dealings therein prohibited.

The Governing Committee may suspend dealings in the securities of any corporation previously admitted to quotation upon the Exchange, or may summarily remove any security from the list.

#### *Trustees of Mortgages.*

The Committee recommends that a trust company or other corporation be appointed trustee of each mortgage or indenture; but when a state law requires the appointment of a local individual as trustee, that a trust company or other corporation be appointed as co-trustee.

The Committee will not accept as trustee for securities an officer or director of the applying corporation, nor a corporation as a trustee in which an officer of the applying corporation is an executive officer.

The Committee will not accept the opinion of an officer or director of an applying corporation, nor of a firm in which the officer or director is a member, as counsel on any legal question affecting the corporation; nor will it accept the opinion of an officer or director of a guarantor corporation, on any legal question affecting the issuance of guaranteed securities.

Each mortgage, indenture or deed of trust made by a corporation or constituting a lien on property of the corporation should be represented by a separate trustee.

The trustee shall present a certificate accepting the trust, giving the numbers and amount of bonds executed, in accordance with the terms of the mortgage or indenture; and certifying that the lien has been recorded, that collateral has been deposited, and that prior obligations, if any, have been canceled, when required by the terms of the mortgage or indenture. The trustee holding securities for which listed certificates of deposit are issued must notify the Stock Exchange if the deposited securities are changed or removed for any reason. For additional issues of bonds, the trustee must certify that such increase has been made in conformity with the terms of the mortgage or indenture; that the lien has been recorded against any new property acquired, that the required additional collateral has been deposited, and that prior obligations, if any, have been canceled, when so required. The trustee shall notify the

Stock Exchange of the holding, cancellation, or retirement, of bonds by redemption, or through the operation of the sinking fund, or by purchase.

*Transfer and Registry.*

Every corporation is required to maintain a transfer agency and a registry office in the borough of Manhattan, city of New York. Both the transfer agency and the registrar must be acceptable to this Committee; the registrar must file with the Secretary of the Stock Exchange an agreement to comply with the requirements in regard to registration.

Certifications of registry must be dated and must bear the signature of a duly authorized officer of the corporation acting as registrar.

*The registrar shall not register any listed stock until authorized by this Committee.*

A trust company or other agency shall not at the same time act as transfer agent and registrar of a corporation.

When a company has its stock transferred at its own office, a transfer agent or transfer clerk shall be appointed by authority of the board of directors to *countersign* certificates, and shall be an individual other than an officer authorized by the by-laws of the company to sign certificates of stock.

The entire amount of the capital stock of a corporation listed upon the Stock Exchange *must be directly transferable* at the transfer office of the corporation in the borough of Manhattan, city of New York.

When a corporation makes transfer of its shares in other cities, the certificates issued therefrom shall be interchangeable, and *identical with the New York certificates*, except as to the names of the transfer agent and the registrar, and the combined amounts of stocks registered in all cities shall not exceed the amount listed.

Interchangeable certificates must bear a legend indicating the right of transfer in New York and other cities.

A change in the form of certificate, of the transfer agency, of the registrar, or of the trustee of bonds, shall not be made without the approval of this Committee.

*The Committee recommends that the text of bonds and certificates of stock shall provide for direct transfer without reference to the books of the corporation.*

*Engraved Certificates Required.*

Every bond, coupon, or certificate of stock, must be printed from steel plates, which have been engraved in the best manner and which have such varieties of work as will afford the greatest security against counterfeiting.

Certificates of deposit of trust companies, banks or firms for securities deposited under reorganizations, voting trusts, or agreements for legal action, must be engraved and printed from steel plates with engraved border and engraved underlying tint.

For each bond, coupon, certificate of stock and certificate of deposit there must be at least two steel plates, viz.: A *face plate* containing the vignettes and lettering of the descriptive or promissory portion of the document which should be printed in black, or in black mixed with a color; and a *tint plate* from which should be made a printing in color underlying important portions of the face printing. The impressions from these two plates must be so made upon the paper that the combined effect of the whole if photographed would be a confused mass of lines and forms, and so give as effectual security as possible against counterfeiting by any process.

The imprint of each denomination of bonds must be of such distinctive appearance and color as to make it readily distinguishable from other denominations and issues. It is required for each class of stock issued that there shall be a distinctively engraved plate for *one hundred shares with said denomination engraved thereon in words and figures*; for certificates issued for smaller amounts, *there shall be a similar plate, distinctive in color, for each issue; there shall be engraved thereon some device whereby the exact written denomination of the certificate may be distinctly designated by perforation*; also conspicuously the words, "*Certificate for less than one hundred shares.*"

The terms of redemption by sinking fund or otherwise, and of conversion into other forms of securities should be recited in the text of bonds.

Certificates of stock should recite ownership, par value, and whether shares are full paid and nonassessable; terms of redemption, preference as to dividends, voting power, or other privilege, including distribution of assets in the event of dissolution of the corporation; certificates for common and preferred stock each shall recite preferences of the preferred; also the following legend:

*This certificate is not valid until countersigned by the transfer agent, and registered by the registrar.*

A power of attorney upon the reverse of a certificate of stock must be irrevocable with a bill of sale and power of substitution. The following form is required:

For value received ..... hereby sell, assign and transfer unto

..... shares of the capital stock represented by the within certificate and do hereby irrevocably constitute and appoint ..... attorney to transfer the said stock on the books of the within named company with full power of substitution in the premises.

Dated....., 19..

In presence of

.....

Notice: The signature to this assignment must correspond with the name as written upon the face of the certificate in every particular without alteration or enlargement, or any change whatever.

*This Committee will object to any security upon which an impress is made by a hand stamp, except for a date or power of substitution.*

No stock certificate or bond will be accepted unless it has been engraved by some engraving company whose work this Committee has been authorized by the Governing Committee to pass upon.

The name of the engraving company must appear upon the face of each bond and certificate of stock and upon the face of each coupon and the title panel of the bond.

Wm. W. Heaton, Chairman.

George W. Ely, Secretary.

## CHAPTER XIX

## PAYMENT FOR STOCK

- § 398. Statutory Requirements.
- 399. Shares Cannot be Sold for Less than Par.
- 400. Payment in Property.
  - 401. 1. Valuation of Property.
  - 402. 2. Construction of State Statutes.
  - 403. 3. Fraud in Valuation.
- 404. Payment in Services.
- 405. Promoters' Commissions in Stock.
- 406. Remedy for Nonpayment.
- 407. Notice of Assessment on Stock.
- 408. Notice of Sale for Nonpayment of Assessments.

## § 398. Statutory Requirements.

With reference to this feature, a distinction must be drawn among the various laws of the different states. Where payment for stock is required to be in cash, the statutory requirement must be followed. Of course, it would be competent for the corporation, at the same time that the cash is paid, to pay it back again to the subscriber for services or property. But it must appear upon the books as a cash transaction, and the whole proceeding must be bona fide.<sup>1</sup>

## § 399. Shares Cannot be Sold for Less than Par.

Unless the governing statute otherwise provides, a corporation cannot issue its shares in the first instance at less than

<sup>1</sup> Baile v. Calvert College Educational Society of Carroll County, 47 Md. 117; Maine v. Butler, 130 Mass. 196; Tasker v. Wallace, 6 Daly (N. Y.) 364, 374; People v. Troy House Co., 44 Barb. (N. Y.) 625; Neuse River Nav. Co. v. Newbern Com'rs, 52 N. C. (7 Jones, Law) 275; Henry v. Vermillion & A. R. Co., 17 Ohio, 187; Moses v. Ocoee Bank, 69 Tenn. (1 Lea) 398.

par. In case of insolvency, persons who purchase their shares for less than par will be obliged to make up to the creditors the difference between the purchase price and the par value.<sup>2</sup> But the Supreme Court of the United States, as well as the Court of Appeals of the state of New York, have given countenance to the doctrine that if an active corporation has become indebted to such an extent that it is without means of payment except by stock, and its shares have actually depreciated in value, it may pay such indebtedness by the issue of stock to such creditors at the actual market value; and, if it decides to issue bonds for which no market can be obtained without giving as a bonus stock in the company, this is legal, provided the par value of the bonds does not exceed their actual value plus the actual value of the stock issued as a bonus.<sup>3</sup>

<sup>2</sup> *Ogilvie v. Knox Ins. Co.*, 22 How. (U. S.) 380, 16 L. Ed. 349; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sanger v. Upton*, 91 U. S. 56, 23 L. Ed. 220; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179; *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Coit v. North Carolina Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; *Washburn v. Green*, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111; *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423.

<sup>3</sup> *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; *Handley v. Stutz*, 139 U. S. 417, 11 Sup. Ct. 530, 35 L. Ed. 227; *Christensen v. Quintard*, 55 Hun, 608, 8 N. Y. Supp. 400; *Van Cott v. Van Brunt*, 82 N. Y. 535.

§ 400. **Payment in Property.**

Where the statute does not prohibit payment for stock in property, property may be received in payment.<sup>4</sup> It is now quite the custom for the state legislatures to expressly enact legislation allowing payment to be made in property.<sup>5</sup> Under such statutes payments in good commercial paper<sup>6</sup> or stock of other corporations<sup>7</sup> (in the absence of a statute prohibiting the purchase of such stock) have been held valid. But the property transferred must be of some real value.<sup>8</sup> While in proper cases good will may be taken in return for stock,<sup>9</sup> circumstances may be such that experience and good will are of too unsubstantial and shadowy a nature to be capable of pecuniary estimation.<sup>10</sup> So it has been held that the "qualified property right of the discoverer of an unpatented recipe or formula is of such a character that it constitutes no substantial property," and therefore cannot be considered a valid payment for stock.<sup>11</sup>

<sup>4</sup> *Evansville, T. H. & C. R. Co. v. Wright*, 38 Ind. 64; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20; *Bruner v. Brown*, 139 Ind. 600, 38 N. E. 318; *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407; *Brant v. Ehlen*, 59 Md. 1; *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432; *Shepard v. Drake*, 61 Mo. App. 134, 1 Mo. App. Rep'r, 138; *American Silk Works v. Salomon*, 4 Hun (N. Y.) 135; *Id.*, 6 *Thomp. & C. (N. Y.)* 352; *Dayton & C. R. Co. v. Hatch*, 1 *Disn. (Ohio)* 84; *Carr v. Le Fevre*, 27 Pa. (3 *Casey*) 413; *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. (4 *Casey*) 318; *Searight v. Payne*, 74 *Tenn. (6 Lea)* 283.

<sup>5</sup> See chapter VII, §§ 85-96.

<sup>6</sup> *Stoddard v. Shetucket Foundry Co.*, 34 *Conn.* 542.

<sup>7</sup> *East New York & J. R. Co. v. Lighthall*, 36 *How. Prac. (N. Y.)* 481.

<sup>8</sup> *Camden v. Stuart*, 144 U. S. 104, 12 *Sup. Ct.* 585, 36 *L. Ed.* 363.

<sup>9</sup> See chapter IX, § 137.

<sup>10</sup> *Camden v. Stuart*, 144 U. S. 104, 12 *Sup. Ct.* 585, 36 *L. Ed.* 363; 1 *Cook, Corp.* §§ 35-47.

<sup>11</sup> *State ex rel. Sanche v. Webb*, 97 *Ala.* 111, 12 *South.* 377, 38 *Am. St. Rep.* 151; *Gillett v. Chicago Title & Trust Co.*, 230 *Ill.* 373,

## § 401. Valuation of Property.

The legislatures in many states have enacted that the judgment of the board of directors as to the value of property or services is, in the absence of fraud, final and conclusive. In other states there is no statutory provision on the subject. But without such it is now well settled that, in order to make void stock which is issued for property taken at an overvaluation, it must be shown, not only that there was an overvaluation, but also that such overvaluation was intentional and fraudulent.<sup>12</sup> But the state might bring an action to declare a forfeiture of the corporate franchise in a flagrant case.<sup>13</sup> Stockholders not assenting to it may also bring suit to annul and set aside the whole transaction.<sup>14</sup> But the great weight of authority is in favor of the proposition that corporate creditors cannot hold the owners of such stock liable as for stock not fully paid.<sup>15</sup>

82 N. E. 891; *Dean v. Baldwin*, 99 Ill. App. 582; *Van Cleve v. Berkeley*, 143 Mo. 109, 44 S. W. 743, 42 L. R. A. 593; *National Tube Works v. Gilfillan*, 124 N. Y. 302, 26 N. E. 538; *O'Bear-Nestor Glass Co. v. Antiexplo. Co.*, 101 Tex. 431, 108 S. W. 967, 109 S. W. 931, 16 L. R. A. (N. S.) 520.

<sup>12</sup> *Coit v. North Carolina Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; *Lloyd v. Preston*, 146 U. S. 630, 13 Sup. Ct. 131, 36 L. Ed. 1111.

<sup>13</sup> *State v. New Orleans Debenture Redemption Co.*, 51 La. Ann. 1827, 26 South. 586; *State ex inf. Attorney General v. Hogan*, 163 Mo. 43, 63 S. W. 378.

<sup>14</sup> *Alabama Foundry & Machine Works v. Dallas*, 127 Ala. 513, 20 South. 459; *Dean v. Baldwin*, 99 Ill. App. 582; *Insurance Press v. Montauk Fire Detective Wire Co.*, 70 App. Div. 50, 74 N. Y. Supp. 1093; *Langan v. Francklyn*, 29 Abb. N. C. 102, 20 N. Y. Supp. 404.

<sup>15</sup> *Coit v. North Carolina Gold Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231, 30 L. Ed. 420; *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 9 Sup. Ct. 332, 32 L. Ed. 725; *Fogg v. Blair*, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104.

## § 402. Construction of State Statutes.

Where a statute forbids the issuance of stock for property unless "actually received," it lies with the company to determine what the actual value is.<sup>16</sup> It is obvious that, when the statute declares that stock may be issued in return for property "to the value thereof," the property cannot be taken at a fraudulent overvalue,<sup>17</sup> though, if there is no fraud, the mere fact that the property has been overvalued does not lay the transaction open to attack.<sup>18</sup> Where the company is allowed to issue stock for property "at its money valuation," the actual value of the property must govern, though fraud must be shown to upset the transaction.<sup>19</sup> Under a statute which prohibited the issue of stock or bonds at a greater value than the market price of the property received at the time of the issue, it was held that the courts would inquire into the actual value, irrespective of the question of fraud.<sup>20</sup> A statute permitted stock to be issued for property "for the *bona fide* fair value thereof." It was held under that act that property

<sup>16</sup> *Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595.

<sup>17</sup> *Kelly v. Clark*, 21 Mont. 291, 331, 332, 53 Pac. 959, 42 L. R. A. 621, 69 Am. St. Rep. 668.

<sup>18</sup> *Schenck v. Andrews*, 57 N. Y. 133; *Boynton v. Andrews*, 63 N. Y. 93; *Douglass v. Ireland*, 73 N. Y. 100; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Gamble v. Queens County Water Co. et al.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Powers v. Knapp*, 85 Hun, 38, 32 N. Y. Supp. 622, affirmed 158 N. Y. 733, 53 N. E. 1131.

<sup>19</sup> *Grant v. East & West R. Co.*, 54 Fed. 569, 4 C. C. A. 511; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65, in which the logic of the deduction made by Mr. Cook in 1 Cook, Corp. § 47, was denied; *Roman v. Dimmick*, 115 Ala. 233, 22 South. 109, where the court disapproves the doctrine in *Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595.

<sup>20</sup> *Altenberg v. Grant*, 85 Fed. 345, 29 C. C. A. 185, where the court, speaking through Taft, J., distinguishes *Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595.

which cost \$6,666.67 could not be turned over to the corporation for \$240,000 of stock.<sup>21</sup> When a statute allowed land to be taken "at a fair cash valuation" in return for stock, it was held that fraud must be shown to invalidate the deal.<sup>22</sup> Where there was a prohibition upon the issuance of stocks "for a less amount than the par value of the shares," the court held that to upset the transaction fraud must be shown, but that great overvaluation is evidence of fraud.<sup>23</sup>

### § 403. Fraud in Valuation.

The rule generally adopted by the courts seems to require that, in order to make illegal an overvaluation, fraud must be shown;<sup>24</sup> but there is other respectable authority to the

<sup>21</sup> *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904.

<sup>22</sup> *Jones v. Whitworth*, 94 Tenn. 602, 30 S. W. 736.

<sup>23</sup> *Wallace v. Carpenter Electric Heating Mfg. Co.*, 70 Minn. 321, 73 N. W. 189, 68 Am. St. Rep. 530.

<sup>24</sup> *Stewart v. St. Louis, Ft. S. & W. R. Co. (C. C.)* 41 Fed. 736; *Brown v. Duluth, M. & N. R. Co. (C. C.)* 53 Fed. 889; *Grant v. East & West R. Co.*, 54 Fed. 569, 4 C. C. A. 511; *Bruner v. Brown*, 139 Ind. 600, 38 N. E. 318.

*Mercer v. Park City Mineral Water Co. (Ky.)* 38 S. W. 841. In this case property bought for \$5,000 was immediately resold to a corporation for \$10,000. The sale was upheld. *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814; *Graves v. Brooks*, 117 Mich. 424, 75 N. W. 932; *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637; *Hastings Malt-ing Co. v. Iron Range Brewing Co.*, 65 Minn. 28, 67 N. W. 652; *Troup v. Horbach*, 53 Neb. 795, 74 N. W. 326, where \$20,000 of stock was issued for property worth only \$6,000. Held good. *Merchants' & Mechanics' Savings Bank v. Belington Coal & Coke Co.*, 51 W. Va. 60, 41 S. E. 390; *Schenck v. Andrews*, 57 N. Y. 133; *Boynnton v. Andrews*, 63 N. Y. 93; *Douglass v. Ireland*, 73 N. Y. 100; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *American Tube & Iron Co. v. Hays*, 165 Pa. 489, 30 Atl. 936; *Kroenert v. Johnston*, 19 Wash. 96, 52 Pac. 605, where property purchased was immediately turned over to a corporation for stock worth twice the purchase price; *Manhattan Trust Co. of New York v. Seattle Coal & Iron Co.*, 19 Wash. 493, 53 Pac. 951, where property purchased for \$100,000 was

effect that, if there is an unlawful valuation, the issue is invalid, irrespective of fraud.<sup>25</sup> The authorities, however, seem practically in accord upon the proposition that, where property of a known value is grossly overvalued and exchanged for stock on that basis, fraud will be presumed, and in the absence of evidence to rebut it this presumption will be conclusive.<sup>26</sup>

turned over to a corporation for stock at a valuation of \$10,000,000; *In re Theatrical Trust*, [1895] 1 Ch. 771.

<sup>25</sup> *Jackson v. Traer*, 64 Iowa, 469, 20 N. W. 764, 52 Am. Rep. 449, where a doctrine was announced which the Supreme Court of the United States in *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468, 35 L. Ed. 88, declined to follow; *Chisholm v. Forny*, 65 Iowa, 333, 21 N. W. 664, where a patent right honestly believed to be worth \$10,000 was turned over at that figure, but subsequently proved worthless; *Boulton Carbon Co. v. Mills*, 78 Iowa, 460, 43 N. W. 290, 5 L. R. A. 649; *Shields v. Hobart*, 172 Mo. 491, 72 S. W. 669, 95 Am. St. Rep. 529; *Rumsey Mfg. Co. v. Kaime*, 173 Mo. 551, 73 S. W. 470; *Boynton v. Hatch*, 47 N. Y. 225 (by a divided court), but this decision seems to be overruled by the later New York cases cited in note 24, *supra*; *Gates v. Tippecanoe Stone Co.*, 57 Ohio St. 60, 48 N. E. 285, 63 Am. St. Rep. 705, where property purchased for \$37,500 was turned over to a corporation as worth \$75,000; *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

<sup>26</sup> *Grant v. East & West R. Co.*, 54 Fed. 569, 4 C. C. A. 511; *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 75 Fed. 554, 23 C. C. A. 302; *Taylor v. Walker* (C. C.) 117 Fed. 737; *Coleman v. Howe*, 154 Ill. 458, 39 N. E. 725, 45 Am. St. Rep. 133, where property of the known value of \$75,000, against which there were debts to the amount of \$70,000, was turned over for \$300,000 of stock; *Wishard v. Hansen & Co.*, 99 Iowa, 307, 68 N. W. 691, 61 Am. St. Rep. 238; *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28, 67 N. W. 652, where property worth \$10,000 was turned over for \$30,000 of stock; *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333, 64 N. W. 978, 1097, where stock was issued to the extent of \$240,000 for property worth only \$20,000, but this case was overruled in the case of *Penfield v. Dawson Town & Gas Co.*, 57 Neb. 231, 77 N. W. 672, involving the same identical transaction; *Wetherbee v. Baker*, 35 N. J. Eq. 501, where land purchased for \$50,000 was turned over for \$100,000 of stock; *Boynton v. Hatch*, 47 N. Y.

§ 404. **Payment in Services.**

Such a payment is good, if not prohibited by statute.<sup>27</sup> The same rules stated above with respect to payment in property apply to services as well.<sup>28</sup>

§ 405. **Promoters' Commissions in Stock.**

It has been held that if promoters have *bona fide* performed services in organizing a corporation, which, under a contract, were to be compensated by stock, it is competent to issue to them the stock contracted for as commissions for such services;<sup>29</sup> but statutes may be so framed as to take away the right to do this.<sup>30</sup>

§ 406. **Remedy for Nonpayment.**

At common law the remedy of the corporation against a shareholder who defaults upon payments for his stock is a suit upon his subscription agreement. Generally the statutes confer a remedy in addition to suit, by way of forfeiture or sale

225; *Douglass v. Ireland*, 73 N. Y. 100, where \$30,000 of stock was issued for property worth only \$4,000; *National Tube-Works Co. v. Gillfillan*, 124 N. Y. 302, 26 N. E. 538, where property worth \$75,000 was turned over for \$300,000 of stock; *Clayton v. Ore Knob Co.*, 109 N. C. 385, 14 S. E. 36; *Manhattan Trust Co. of New York v. Seattle Coal & Iron R. Co.*, 16 Wash. 499, 48 Pac. 333, 737, where property was purchased for \$70,000 and turned over for \$5,000,000 of stock, but the finding of facts in this case was subsequently overruled in *Id.*, 19 Wash. 493, 53 Pac. 951; *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Gogebic Investment Co. v. Iron Chief Mining Co.*, 78 Wis. 427, 47 N. W. 726, 23 Am. St. Rep. 417. See "American Lawyer," vol. 15, No. 3, p. 115.

<sup>27</sup> *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212.

<sup>28</sup> See *supra*, §§ 400-403.

<sup>29</sup> *Arapahoe Cattle & Land Co. v. Stevens*, 13 Colo. 534, 22 Pac. 823; *Zabel v. New State Telephone Co.*, 127 Mich. 402, 86 N. W. 949; *Beach v. Smith*, 30 N. Y. 116.

<sup>30</sup> *Garrett v. Kansas City Coal Mining Co.*, 113 Mo. 330, 20 S. W. 965, 35 Am. St. Rep. 713.

of the delinquent stock. While this is now very generally permitted, it should be remembered that forfeiture is not allowed unless the statutes or charter sanction it. It should be observed that when the remedy by forfeiture is resorted to the weight of judicial decision favors the doctrine that the subscriber is thereby released from any further liability upon his agreement.<sup>81</sup> The validity of a forfeiture depends upon a strict compliance with the terms of the statute authorizing it. In the first place, the assessment must have been in absolute accord with law. Next, the stockholder in default must have been notified of the assessment and proposed forfeiture or sale for failure to comply. This notice should have correctly stated the amount due, the time within which and the place where payment was to be made, and the intended place of sale, as well as any other matters specified in the governing statute. Lastly, the forfeiture or sale must be made in the exact manner pointed out by law, and must be for the benefit of the company, and not by way of mere collusion to relieve the stockholder from further liability. Elaborate discussions of the law relating to this subject, as well as citations of cases supporting the rules above announced, may be found in the authorities cited in the note.<sup>82</sup>

#### § 407. Notice of Assessment on Stock.

....., 19...

Mr. John Doe, 70 Broad Street, New York City.

Dear Sir: You are hereby notified that, in accordance with law and the regulations of this company, the board of directors, by a resolution duly passed on the ..... day of ....., A. D. ...., ordered an assessment of ..... per cent. on the unpaid capital stock of this company, the amount so assessed to be paid to ....., the treasurer thereof, at the office of the company in the ..... Building, No. ...., ..... Street, New York City, on or before the ..... day of ....., A. D. ...., at the hour of ..... o'clock .... m. In accord-

<sup>81</sup> Mills v. Stewart, 41 N. Y. 384.

<sup>82</sup> 1 Cook, Corp. c. 8; 10 Cyc. pp. 499-509.

ance with said resolution and with the authority conferred upon me, I hereby notify you of such call, and that the amount due by you thereunder is the sum of \$....., which said amount must be paid as above ordered; otherwise, the unpaid stock upon which such assessment has been made will be sold in the manner provided by law and the rules of this company.

Yours truly, ..... Secretary.

# § 408. Notice of Sale of Stock for Nonpayment of Assessments.

....., 19...

Mr. John Doe, 70 Broad Street, New York City.

Dear Sir: You are hereby notified that, because of the fact that the amount unpaid on the stock held by you in this company and called for on the ..... day of ....., A. D. 19., under the terms of a resolution passed by the board of directors on the ..... day of ....., A. D. 19., has not been paid, the undersigned, under the provisions of the resolution of the board of directors mentioned, and in accordance with law, will sell at public auction on the ..... day of ....., A. D. 19., at the hour of ..... o'clock .... m., at the office of ....., No. ...., ..... Street, New York City, ..... shares of the capital stock of said company standing in the name of ....., or so much thereof as may be sufficient to pay the amount called for as aforesaid, with interest from the ..... day of ..... A. D. 19., to the day of sale, and all necessary and proper charges incidental thereto.

There has been paid to said company on each of said shares the sum of \$....., leaving \$..... still due and unpaid on each of said shares.

Yours truly, ..... Treasurer.

## CHAPTER XX

## DIVIDENDS

- § 409. Who may Declare.
- 410. When Dividends may be Declared.
- 411. What are Profits.
- 412. Liability for Illegal Dividends.  
Persons Entitled.
- 413. 1. Transfer of Shares.
- 414. 2. Life Tenants and Remaindermen,
- 415. Classes of Dividends.
- 416. 1. Cash Dividends.
- 417. 2. Stock Dividends.
- 418. 3. Scrip and Bond Dividends.
- 419. 4. Property Dividends.

## § 409. Who may Declare.

The declaration of dividends generally rests with the directors, who may fix the amounts, times, and places of payment.<sup>1</sup> In distributing dividends the directors have no power to discriminate among shareholders of the same class.<sup>2</sup>

## § 410. When Dividends may be Declared.

Dividends can be declared only out of *profits*, except when the company is in liquidation and its corporate assets are being divided among the shareholders.<sup>3</sup> This statement, however, must be understood with the qualification that companies operating mines, patent rights, or doing business under leases which are counted as a part of their capital, and which cap-

<sup>1</sup> 2 Cook, Corp. § 545, and notes; 10 Cyc. 548, 549, 883, and cases cited. See chapter IX, § 150; chapter XV, § 321.

<sup>2</sup> *Ryder v. Alton & S. R. Co.*, 13 Ill. (3 Peck) 516; *Jones v. Terre Haute & R. R. Co.*, 57 N. Y. 196; 2 Clark & Mar. Corp. § 525*b*, and notes; 2 Cook, Corp. § 540, and note.

<sup>3</sup> 2 Cook, Corp. § 546, and note; 10 Cyc. 551.

ital is necessarily diminished by the very use of this portion of the assets, are extended greater indulgence under the law in this regard.<sup>4</sup>

### § 411. What are Profits.

The Supreme Court of the United States has said that the term "profits," out of which dividends can alone be declared, denotes what remains after defraying every expense, including loans falling due, as well as interest on such loans.<sup>5</sup> "Profits" of a corporation have been defined in Iowa to "consist in the excess of its cash and other property on hand over its liabilities."<sup>6</sup> There may be no legitimate dividends paid so long as the outstanding indebtedness of the company is greater than its assets.<sup>7</sup>

### § 412. Liability for Illegal Dividends.

The declaration of a dividend not based on profits may amount to a fraudulent representation of the existence of profits, so that a person who purchased stock in reliance upon such representation may have a cause of action against the directors declaring such dividend.<sup>8</sup>

<sup>4</sup> *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *People ex rel. United Verde Copper Co. v. Roberts*, 156 N. Y. 585, 51 N. E. 293; *Bond v. Barrow Haematite Steel Co.*, 86 L. T. Rep. 10 (1902); *Verner v. General & Commercial Investment Trust* [1894] 2 Ch. 239, 266; *Lambert v. Neuchatel Asphalte Co., Ltd.*, 51 L. J. (Ch.) 882 (1882); *Lee v. Neuchatel Asphalte Co.*, L. R. 41 Ch. Div. 1, 20, 22, 24 (1889).

<sup>5</sup> *Eyster v. Centennial Board of Finance*, 94 U. S. 500, 24 L. Ed. 188.

<sup>6</sup> *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915.

<sup>7</sup> *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849; *Park v. Grant Locomotive Works*, 40 N. J. Eq. 114, 3 Atl. 162; *Barry v. Merchants' Exchange Co.*, 1 Sandf. Ch. (N. Y.) 280, 307; *Ottinger v. Bennett*, 144 App. Div. 525, 129 N. Y. Supp. 819; *Id.*, 203 N. Y. 554, 96 N. E. 1123; 5 *Thompson on Corporations*, §§ 5311, 5383.

<sup>8</sup> *Ottinger v. Bennett*, 144 App. Div. 525, 129 N. Y. Supp. 819; *Id.*, 203 N. Y. 554, 96 N. E. 1123. See chapter XV, § 325.

**§ 413. Persons Entitled—Transfer of Shares.**

The general rule is that a dividend belongs to the owner of stock at the time it is declared, irrespective of the date when it is earned, although it may be made payable at a future date.<sup>9</sup> When declared, it becomes the separate property of the owner of the stock at the time it is declared; and in the absence of a special agreement, if the stock is subsequently sold, the sale does not carry the right to declared dividends.<sup>10</sup>

**§ 414. Life Tenants and Remaindermen.**

Regular as well as extra cash dividends declared out of the profits of a business belong to the life tenant as against a remainderman.<sup>11</sup> On the other hand, dividends in the way of new stock, or privileges to purchase same, resulting from the increase in the value of the company's property or the development of its business, and which do not in the strict sense represent surplus earnings, belong to the remaindermen.<sup>12</sup>

<sup>9</sup> *Wheeler v. Northwestern Sleigh Co.* (C. C.) 39 Fed. 347; *Dow v. Gould & Curry Silver Mining Co.*, 31 Cal. 630; *Bright v. Lord*, 1 Wils. (Ind.) 523; *Central R. & Banking Co. v. Papot*, 59 Ga. 342; *Chinn v. Courtney*, 14 Ky. Law Rep. 422; *Goodwin v. Hardy*, 57 Me. 143, 99 Am. Dec. 758; *Richardson v. Richardson*, 75 Me. 570, 46 Am. Rep. 428; *Houser v. Richardson*, 90 Mo. App. 134; *Jones v. Terre Haute & R. R. Co.*, 17 How. Prac. (N. Y.) 529; *King v. Follett*, 3 Vt. 385; 2 Cook, Corp. § 539, and notes; 10 Cyc. 556, and cases cited.

<sup>10</sup> *Hopper v. Sage*, 112 N. Y. 530, 20 N. E. 350, 8 Am. St. Rep. 771.

<sup>11</sup> *Hite's Devisees v. Hite's Ex'r*, 93 Ky. 257, 20 S. W. 778, 14 Ky. Law Rep. 385, 40 Am. St. Rep. 189, 19 L. R. A. 173; *Peirce v. Burroughs*, 58 N. H. 302; *Van Blarcom v. Dager*, 31 N. J. Eq. 783; *Appeal of Vinton*, 99 Pa. 434, 44 Am. Rep. 116.

<sup>12</sup> *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; *Id.*, 4 Mackey (D. C.) 130, 54 Am. Rep. 262; *Spooner v. Phillips*, 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461; *Millen v. Guerrard*, 67 Ga. 292, 44 Am. Rep. 720; *Waterman v. Alden*, 42 Ill. App. 294; *Gilkey v. Paine*, 80 Me. 319, 14 Atl. 205; *Minot v. Paine*, 99 Mass. 101, 96 Am. Dec. 705; *Daland v. Williams*, 101 Mass. 571; In re

**§ 415. Classes of Dividends.**

The dividends which a corporation may legally make may be divided into four classes: First, cash dividends; second, stock dividends; third, bond or scrip dividends; fourth, property dividends.<sup>13</sup>

**§ 416. Cash Dividends.**

A cash dividend is the ordinary dividend paid in money.

**§ 417. Stock Dividends.**

A stock dividend is one payable in stock of the company. When the corporate assets have become enhanced beyond the par value of its capital stock by additions or improvements made by accumulating profits and applying them in this way, or from other causes, the nominal capital may be increased to the extent of the actual surplus thus acquired, and the increased stock may be distributed among the shareholders as dividends.<sup>14</sup>

**§ 418. Scrip and Bond Dividends.**

A scrip dividend is one by which certificates are distributed as dividends among the stockholders, giving them the rights mentioned in them. A bond dividend is one declared when the corporation has a bona fide surplus, and, as evidence of that surplus and of the stockholders' right in it, bonds are issued pro rata among the stockholders, instead of distributing the

Thomson's Estate, 1 Pa. Dist. R. 139, 11 Pa. Co. Ct. R. 198; Smith's Estate, 140 Pa. 344, 352, 21 Atl. 438, 23 Am. St. Rep. 237; Parker v. Mason, 8 R. I. 427.

<sup>13</sup> 2 Cook, Corp. § 534.

<sup>14</sup> Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; Howell v. Chicago & N. W. R. Co., 51 Barb. (N. Y.) 378; Williams v. Western Union Telegraph Co., 93 N. Y. 162; 2 Cook, Corp. § 536, and notes; 2 Clark & Mar. Corp. § 523, and notes; 10 Cyc. 555, and cases cited.

surplus in cash. Instead of declaring a bond dividend, the board of directors may issue scrip pro rata among the shareholders, certifying that they are entitled, upon the sale of the surplus, to certain rights therein.<sup>15</sup>

A discussion of the rights of stockholders to additional stock upon an increase of the capital will appear in a subsequent chapter.<sup>16</sup>

### § 419. Property Dividends.

A property dividend is one payable in specific property, instead of cash, bonds, or scrip. The surplus accumulated may be in the shape of property not at the time readily convertible into cash, but which may be conveniently divided in kind. Or a property dividend may be declared where a corporation is in process of dissolution, having sold all its assets to another corporation, the latter distributing stock directly among the shareholders of the former company as the purchase price of the property bought. This latter kind of dividend has been declared illegal without unanimous consent of stockholders and creditors.<sup>17</sup>

<sup>15</sup> 2 Cook, Corp. § 535, and notes; 2 Clark & Mar. Corp. § 523, and notes; 10 Cyc. 555, and cases cited.

<sup>16</sup> See chapter XII, § 246.

<sup>17</sup> 2 Cook, Corp. § 535, and notes; 2 Clark & M. Corp. § 523, and notes; see chapter XXV, § 525.

## CHAPTER XXI

## TRANSFER OF STOCK.

- § 420. Right to Transfer.
- 421. Precautions to be Taken.
- 422. Identity of Holder.
- 423. Rights of Third Persons.
- 424. Form of Certificate to Trustee.
- 425. Transfer by Trustee.
- 426. Transfer by Executor.
- 427. Transfer by Lunatic.
- 428. Transfer by Minor.
- 429. Transfer by Corporation.
- 430. Transfer by Partnership.
- 431. Transfer by Joint Owners.
- 432. Jurisdiction of Court.
- 433. Appeal Pending.
- 434. Transfer Taxes.
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- 436. Pledge of Stock.
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- 437.       1. Transfer of Stock.
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- 439. Practice in Transferring Stock.
- 440. Regulations Established by New York Trust Companies.
- 441. Negotiability of Stock.
- 442. Lost Certificates.
- 443. Indemnity Bond.
- 444.       Form.

## § 420. Right to Transfer.

A stockholder has a right to transfer his stock to any person he pleases, and the others interested in the corporation cannot prevent the transferee succeeding to the rights of the transferor.<sup>1</sup> Frequently, however, the charter or by-laws of the

<sup>1</sup> *Morgan v. Struthers*, 131 U. S. 246, 9 Sup. Ct. 726, 33 L. Ed. 132; *Farmers' Loan & Trust Co. v. Chicago P. & S. R. Co.*, 163 U.

company, or contracts entered into between the stockholders, attempt to restrict the right to sell stock without first offering it to the corporation or the other parties interested in it and giving them a chance to purchase. Such restrictions, when agreed to by the parties benefited by them, have been frequently upheld in this country,<sup>2</sup> although the courts of Maryland and Tennessee<sup>3</sup> have declared them illegal. The state of Maryland has since authorized by statute such provisions restricting the right to dispose of stock.<sup>4</sup>

### § 421. Precautions to be Taken.

Very many interesting questions arise as to the circumstances under which the officers of the corporation will be permitted to make a transfer of stock upon the request of the

S. 31, 16 Sup. Ct. 917, 41 L. Ed. 60; Board of Com'rs of Tippecanoe County v. Reynolds, 44 Ind. 509, 15 Am. Rep. 245; Quiner v. Marblehead Social Ins. Co., 10 Mass. 476; Downing v. Potts, 23 N. J. Law (3 Zab.) 66; Brightwell v. Mallory, 18 Tenn. (10 Yerg.) 196. See chapter II, § 24.

<sup>2</sup> Brown v. Pacific Mail S. S. Co., 5 Blatch. 525, Fed. Cas. No. 2,025; New England Trust Co. v. Abbott, 162 Mass. 148, 38 N. E. 432, 27 L. R. A. 271; Jones v. Brown, 171 Mass. 318, 50 N. E. 648; Barrett v. King, 181 Mass. 476, 63 N. E. 934; Costello v. Portsmouth Brewing Co., 69 N. H. 405, 43 Atl. 640; Rosenfeld v. Einstein, 46 N. J. Law (17 Vroom) 479; Moses v. Soulé, 118 N. Y. Supp. 410, 63 Misc. Rep. 203, affirmed 120 N. Y. Supp. 1136, 136 App. Div. 904; Garrett v. Philadelphia Lawn Mower Co., 39 Pa. Super. Ct. 78; Boyer v. Nesbitt, 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890; Sweetland v. Quidnick Co., 11 R. I. 328; Ireland v. Globe Milling & Reduction Co., 20 R. I. 190, 38 Atl. 116, 38 L. R. A. 299; Ireland v. Globe Milling Co., 21 R. I. 9, 41 Atl. 258, 79 Am. St. Rep. 769; Nicholson v. Franklin Brewing Co., 82 Ohio St. 94, 91 N. E. 991, 137 Am. St. Rep. 764, 19 Ann. Cas. 699; In re Laun, 146 Wis. 252, 131 N. W. 366. See 10 Cyc. 579. This subject is fully discussed in 2 Cook, Corp. § 622c.

<sup>3</sup> Victor G. Bloede Co. v. Bloede, 84 Md. 129, 34 Atl. 1127, 33 L. R. A. 107, 57 Am. St. Rep. 373; Herring v. Ruskin Co-op. Ass'n (Tenn. Ch. App. 1899) 52 S. W. 327.

<sup>4</sup> Code Pub. Gen. Laws Md. 1908, art. 23, §§ 3(e), 33.

holder of the certificate. In the first place, it is a principle of law that, in the absence of a statute or charter provision to the contrary, every corporation is bound to make a transfer upon the request of the party legally entitled to hold the certificate and to demand the transfer; which is merely saying that the corporation must at its peril determine whether the person presenting the certificate for transfer is the legal holder of it, and whether under the circumstances he is entitled to demand a transfer.<sup>5</sup> It is not the duty of the company to inquire into the motives of the transfer,<sup>6</sup> nor does the mere fact that there is an unpaid assessment against the share defeat the right of the transferee to insist upon having the transfer made upon the company's books.<sup>7</sup>

#### § 422. Identity of Holder.

A corporation is bound to know the signatures of its stockholders.<sup>8</sup> Therefore the prudent secretary will always have on file the signature of every person in whose name a certificate is issued. When a certificate is presented for transfer the signature to the assignment can then be compared with the registered signature among the records of the corporation. If the two do not correspond, an inquiry must be made and pursued until the genuineness of the signature is established.<sup>9</sup>

<sup>5</sup> *Skinner v. Ft. Wayne, T. H. & S. W. R. Co.* (C. C.) 58 Fed. 55; 3 *Clark & M. Corp.* § 1720.

<sup>6</sup> *State ex rel. Townsend v. McIver*, 2 S. C. (2 Rich.) 25; *In re Klaus*, 67 Wis. 401, 29 N. W. 582.

<sup>7</sup> *Craig v. Hesperia Land & Water Co.*, 113 Cal. 7, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316; *Fitzhugh v. Bank of Shepherdsville*, 19 Ky. (3 T. B. Mon.) 126, 16 Am. Dec. 90; *Sargent v. Franklin Ins. Co.*, 25 Mass. (8 Pick.) 90, 19 Am. Dec. 306; *Watson v. Sidney F. Woody Printing Co.*, 56 Mo. App. 145.

<sup>8</sup> *Unity Banking & Saving Co. v. Bettman*, 217 U. S. 127, 30 Sup. Ct. 488, 54 L. Ed. 695; 10 Cyc. 625.

<sup>9</sup> *Western Union Telegraph Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047; *Davis v. Governor and Company of Bank of England*, 2

The corporation may require the personal attendance of the party interested, for the purpose of determining this question.<sup>10</sup>

### § 423. Rights of Third Persons.

The company must next ascertain whether it is in possession of information apprising it, either actually or constructively, of rights of third persons in the stock. If so, the respective rights of the claimants must be settled before a transfer can properly be made.<sup>11</sup> Where, for example, certain stock which has been issued in the name of A. B., as trustee, is presented for transfer, according to the general trend of opinion the company must satisfy itself that the trustee is authorized under the terms of his trust to make the desired transfer.<sup>12</sup> As this information is sometimes difficult to obtain, the following advice given on this subject by a writer on the transfer of stock is pertinent:

### § 424. Form of Certificate to Trustee.

"Notice of a trust which affects stock is, in general, obtained only by means of the certificate, and it is of great importance that certificates should not be so issued as to mislead purchasers. The certificate should not state that the owner holds the stock as trustee unless it is true, and if there is a real

Bing. 393; *Ireland v. Hart*, 86 L. T. (N. S.) 385 (Eng. 1902); 2 Cook, Corp. § 401.

<sup>10</sup> *Chew v. Bank of Baltimore*, 14 Md. 299; 2 Cook, Corp. § 410, and cases cited.

<sup>11</sup> *Read v. Cumberland Telegraph & Telephone Co.*, 93 Tenn. (9 Pickle) 482, 27 S. W. 660.

<sup>12</sup> *Geyser-Marion Gold Mining Co. v. Stark*, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684; *Loring v. Salisbury Mills*, 125 Mass. 138; *Bayard v. Farmers' & Mechanics' Bank of Philadelphia*, 52 Pa. (2 P. F. Smith) 232; *Magwood v. Southwestern R. Bank*, 5 S. C. (5 Rich.) 379; 1 Cook, Corp. § 399, and cases cited; 3 *Clark & M. Corp.* §§ 600a, 600b, and cases cited; 10 Cyc. 621, and cases cited.

trust the certificate should contain such a reference to it that it can readily be identified and its terms easily discovered. The common practice of issuing certificates, and inserting the word 'trustee' after the name of the owner, puts upon the purchaser and the corporation an unnecessary burden, and lays them open to indefinite future liability. The difficulty of investigating a trust described in this way is so great that many purchasers and corporations are likely to prefer the risk of loss to the labor of hunting up the trust, and thereby the interests of the cestui que trust are imperiled, while the corporation may find itself involved in a liability which a little care at the right time would have entirely prevented."<sup>13</sup>

#### § 425. Transfer by Trustee.

A guardian is regarded as a trustee for the purposes of the application of the rule of law above announced.<sup>14</sup> Whether an executor holding under a will is to be regarded as a trustee who must satisfy the corporation as to his right to make the contemplated transfer is somewhat unsettled by the decisions. Probably where the executor acts merely as such, and is not also made testamentary trustee, the corporation will be protected in making a transfer merely on the executor's order, as it would be in the case of an administrator;<sup>15</sup> without ascertaining whether under the terms of the will the transfer is authorized. But even then, where the statute or rules of court of the testator's domicile require an order of the court before such transfer can be made, the exhibition of a certified copy of

<sup>13</sup> Lowell, *Transfer Stock*, § 79; *Duncan v. Jaudon*, 15 Wall. (U. S.) 165, 21 L. Ed. 142.

<sup>14</sup> *City of Baltimore v. Norman*, 4 Md. 352; *Atkinson v. Atkinson*, 8 Allen (Mass.) 15; *O'Herron v. Gray*, 168 Mass. 573, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L. R. A. 498; *Webb v. Graniteville Mfg. Co.*, 11 S. C. 396, 32 Am. Rep. 479; *Kempner v. Wallis*, 2 Willson, Civ. Cas. Ct. App. (Tex.) § 587. See supra, § 423.

<sup>15</sup> 2 Cook, Corp. §§ 329, 398, and cases cited; 10 Cyc. 622, and cases cited. But see 3 Clark & M. Corp. 600b, 601a, 601b, and cases cited.

such order should be insisted upon by the corporation,<sup>16</sup> and, in addition, the transfer officer must make sure that the executor has pursued the course mapped out by the order.

### § 426. Transfer by Executor.

In many cases an executor is also appointed testamentary trustee. When his duties as executor are finished, the law itself, *eo instante* and without any action of the court, terminates his office as executor, and regards him thereafter as testamentary trustee.<sup>17</sup> It would be difficult for the corporation to know whether the party proposing to transfer the stock was really acting in the capacity of executor or of trustee, and for this reason it would be prudent to insist upon the exhibition of a certified copy of the will in each case.<sup>18</sup> The instant the party is divested of his character of executor and commences to hold stock as testamentary trustee, then all the incidents of trusteeship apply, and the company is bound to see that no transfer is made in disregard of the terms of the trust.<sup>19</sup> A number of interesting cases have arisen where corporations have been held to accountability because of a disregard of this rule, some of them cases which seem harsh in the extreme, but which on analysis will be found to contain a just and scientific exposition of the rule of law.<sup>20</sup>

<sup>16</sup> *Fambro v. Gantt*, 12 Ala. 298; *Weyer v. Second Nat. Bank of Franklin*, 57 Ind. 198; *Saxon v. Barksdale*, 4 Desaus. (S. C.) 522.

<sup>17</sup> *Yeaton v. Lynn, to Use of Lyles*, 5 Pet. (U. S.) 224, 229, 8 L. Ed. 105; *State, to Use of Gable, v. Cheston*, 51 Md. 352, 373.

<sup>18</sup> *Lowry v. Commercial & Farmers' Bank, Taney*, 310, Fed. Cas. No. 8,581; *Albert v. Savings Bank of Baltimore*, 1 Md. Ch. 407; 1 Cook, Corp. § 398.

<sup>19</sup> *Marbury v. Ehlen*, 72 Md. 206, 19 Atl. 648, 20 Am. St. Rep. 467; 10 Cyc. 622, and cases cited.

<sup>20</sup> *Lowry v. Commercial & Farmers' Bank, Taney*, 310, Fed. Cas. No. 8,581; *Farmers' & Mechanics' Bank of Frederick County v. Wayman*, 5 Gill (Md.) 336; *Stewart v. Firemen's Ins. Co. of Baltimore*, 53 Md. 564; *Marbury v. Ehlen*, 72 Md. 206, 19 Atl. 648, 20

**§ 427. Transfer by Lunatic.**

If a person making an assignment is not *sui juris*, the corporation will not be protected by a transfer on the order of such a person. An assignment by a lunatic is, for instance, in some jurisdictions void, upon the principle, announced by the Supreme Court of the United States,<sup>21</sup> that all contracts entered into by a lunatic are void. Other courts, however, have declared them to be simply 'voidable, and if third persons have acquired rights under them it is too late to set up their invalidity.<sup>22</sup> Still, a corporation having notice of the lunacy of a stockholder would assume a great risk in attempting to make a transfer upon his order.

**§ 428. Transfer by Minor.**

It has been held that a corporation is justified in acting upon an assignment made by a minor, if it has not been avoided by the minor at the date of the application for registration.<sup>23</sup> This is upon the ground that a contract by a minor is not void, but merely voidable, at his option.

**§ 429. Transfer by Corporation.**

Where, by reason of the form in which a certificate of stock is issued, or otherwise, the transfer officer is given notice that stock issued in the name of any individual is really held by him as an officer of a corporation, then it is his duty to see that the stock is not transferred, except by authority duly given by the corporation.<sup>24</sup>

Am. St. Rep. 467; *Mobile & O. R. Co. v. Humphries* (Miss. 1890) 7 South. 522; *Caulkins v. Gaslight Co.*, 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786.

<sup>21</sup> *Dexter v. Hall*, 15 Wall. (U. S.) 9, 21 L. Ed. 73; 2 Cook, Corp. § 427.

<sup>22</sup> *Chew v. Bank of Baltimore*, 14 Md. 299; *Clark*, Cont. 268-270.

<sup>23</sup> *Smith v. Nashville & D. R. Co.*, 91 Tenn. 221, 18 S. W. 546.

<sup>24</sup> *Fudickar v. East Riverside Irrigation Dist.*, 109 Cal. 29, 41

**§ 430. Transfer by Partnership.**

An ordinary transfer of stock to a third party by a partnership, signed in the partnership name by any of the partners, would be valid and effectual, and would protect the company making the transfer. If, however, one partner should sign in the firm's name a transfer of corporate stock to himself individually, this might be notice to the corporation which is requested to register the transfer that the individual partner, and not the firm, is receiving the benefit of it. Under these circumstances the corporation would be wise to procure the signatures of the other partners before allowing the transfer to go through.<sup>25</sup>

**§ 431. Transfer by Joint Owners.**

When the title to stock has been vested in two or more persons jointly, the assignment must be united in by all in order that it may be declared valid.<sup>26</sup> This rule, however, does not apply to joint executors or administrators, each of whom alone has power to act on behalf of his decedent. A transfer signed by one only, therefore, would pass title.<sup>27</sup>

**§ 432. Jurisdiction of Court.**

An order of the court to transfer stock will not always protect the company. The company must satisfy itself that the court had jurisdiction to pass the order, for, if not, the order is void. As an illustration, suppose the court should appoint an administrator of the estate of a party supposed to be dead, and thereafter authorize such administrator to sell certain

Pac. 1024; *Stamford Bank v. Ferris*, 17 Conn. 259; *Union Bank of Florida v. Call*, 5 Fla. 409.

<sup>25</sup> *Gill v. Crosby*, 63 Ill. 190.

<sup>26</sup> *Schell v. Deperven*, 198 Pa. 591, 48 Atl. 815; 2 Cook, Corp. §§ 398, 429; 10 Cyc. 625.

<sup>27</sup> *Appeal of Wood*, 92 Pa. 379, 37 Am. Rep. 694; *Schell v. Deperven*, 198 Pa. 600, 48 Atl. 813, 82 Am. St. Rep. 820; *Williams*,

stock owned by his alleged decedent's estate. Subsequently the supposed dead man appears and lays claim to the stock, and files proceedings against the corporation for its illegal transfer. The order of the court would afford no protection.<sup>28</sup>

### § 433. Appeal Pending.

Again, an order of a competent court having jurisdiction of the subject-matter may be reversed by a higher court, in which case action taken pursuant to the order of the court below cannot be pleaded in defense of conduct contrary to that declared proper by the appellate court.<sup>29</sup>

### § 434. Transfer Taxes.

Where, as in New York, a tax is imposed upon the transfer of stock, care should be taken to make no transfer until the tax levied has been paid; otherwise the transfer officer may make himself liable to fine and imprisonment.<sup>30</sup> In order to become taxable under the New York law, a transfer need not involve a sale, provided it does require a transfer from one person to another. The law is construed to apply to every transfer of stock, whether of a domestic or foreign corporation, if the transfer is to be made on the books of the company within the state of New York.<sup>31</sup>

Ex'rs, part 3, book 1, c. 2; Lowell, *Transfer of Stock*, p. 36. But see *Barton v. London & Northwestern Ry. Co.*, 24 Q. B. Div. 77.

<sup>28</sup> *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654; *Scott v. McNeal*, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.

<sup>29</sup> *Caulkins v. Gaslight Co.*, 85 Tenn. 683, 4 S. W. 287, 4 Am. St. Rep. 786; 3 Cyc. 460.

<sup>30</sup> *New York Stock Transfer Tax Law* (Consol. Laws 1909, c. 60) art. 12, as amended by Laws 1910, c. 186; Laws 1911, cc. 12, 352.

<sup>31</sup> *Rulings of State Comptroller's Office promulgated June 15, 1911.*

## § 435. Inheritance Taxes.

While the New York transfer tax law does not apply to a transfer from the name of a deceased person to his executor or administrator, it does apply to a transfer from the latter.<sup>31</sup> Transfers of stock by the estates of deceased persons are also in many other states subject to an inheritance tax law.<sup>32</sup>

## § 436. Pledge of Stock.

The owner of stock has a right to pledge it by the delivery of his certificates duly assigned.<sup>33</sup> If the obligation for which the stock is pledged is not met at maturity, the pledgee has a right to sell the stock either at public or private sale, provided he gives the pledgor reasonable notice to redeem and of the time and place of sale.<sup>34</sup> But it has been held that the pledgee, in the absence of a contract to that effect, has no right to purchase the stock himself,<sup>35</sup> and cannot sell at private sale for less than the market price.<sup>36</sup>

## § 437. Form of Transfer of Stock.

## FORM OF TRANSFER.

For value received, I hereby sell, assign, and transfer unto, ..... of ....., ..... shares of the capital stock represented by the within certificate, and do hereby irrevocably

<sup>31</sup> Rulings of State Comptroller's Office promulgated June 15, 1911.

<sup>32</sup> See chapter VII, §§ 85-96.

<sup>33</sup> *New Orleans Nat. Banking Ass'n v. Wiltz* (C. C.) 10 Fed. 330; *McClintock v. Central Bank of Kansas City*, 120 Mo. 127, 24 S. W. 1052; *Hasbrouck v. Vandervoort*, 6 N. Y. Super. Ct. (4 Sandf.) 74.

<sup>34</sup> *Canfield v. Minneapolis Agricultural & Mechanical Ass'n* (C. C.) 14 Fed. 801; *Sparhawk v. Drexel*, Fed. Cas. No. 13,204; *Brown v. Ward*, 10 N. Y. Super. Ct. (3 Duer) 660.

<sup>35</sup> *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242, 89 Am. Dec. 779; *President, etc., of Middlesex Bank v. Minot*, 45 Mass. (4 Metc.) 325.

<sup>36</sup> *Nabring v. Bank of Mobile*, 58 Ala. 204.

cably constitute and appoint ..... attorney to transfer the said stock on the books of the within-named company, with full power of substitution in the premises.

Dated .....

### § 438. Form of Transfer Book.

No. Shares .....	Transfer No. ....	19
Transferred by .....		
<i>Ledger Folio.</i>	For value received, I, .....	
Transferred to .....	of ..... do hereby sell, assign and transfer	
<i>Ledger Folio.</i>	to ..... of .....	
No. Certificate .....	..... shares of the capital stock of	
<i>Surrendered.</i>	(Name of company may be printed here.)	
Date of Certificate .....		
<i>Surrendered.</i> 19	standing in my name on the books of the company.	
No. of Certificate .....		
<i>Issued.</i>		
Dated ..... 19	By .....	

### § 439. Practice in Transferring Stock.

It may be observed from the above forms that the owner of stock is supposed to appoint some one as his attorney to make the requisite transfer on the books of the company. In practice the owner usually leaves blank the name of the attorney, and the certificate, with the name of this attorney still blank, is generally delivered at the office of the transfer officer of the corporation, who fills in either his own name or the name of some one in his office.<sup>37</sup> The person whose name is thus filled in then signs the actual transfer on the transfer book. The owner of the stock may, if he pleases, fill in the name of any other person; but that will necessitate that per-

<sup>37</sup> Bridgeport Bank v. New York & N. H. R. Co., 30 Conn. 231; Walker v. Detroit Transit Ry. Co., 47 Mich. 338, 11 N. W. 187; Kortright v. Buffalo Commercial Bank, 20 Wend. (N. Y.) 91; Dunn v. Commercial Bank of Buffalo, 11 Barb. (N. Y.) 580; Fatman v. Loebach, 8 N. Y. Super. Ct. (1 Duer) 354; Leavitt v. Fisher, 11 N. Y. Super. Ct. (4 Duer) 1; Germania Union Bldg. & Sav. Fund Ass'n v. Sendmeyer, 50 Pa. (14 Wright) 67.

son presenting himself at the transfer office and placing his signature in the transfer book.

#### § 440. Regulations Established by New York Trust Companies.

The trust companies of the state of New York, when transferring stock registered in the names of executors, trustees, corporations, etc., require that the parties signing the transfer shall file with them: First, a certificate by the proper court official showing the appointment of the executor or administrator; second, a certified copy of the will, if there is one; third, a waiver by the comptroller of the state of New York of any notice respecting inheritance tax, or a consent from him to the transfer; fourth, the indenture which creates the trust; fifth, the power of attorney to make the transfer; sixth, a guaranty of the signature by some bank or its authentication by a notary public; seventh, in the case of transfers by corporations, a certified copy of the by-laws authorizing the officer presenting the certificate to make the transfer, or else a special resolution of the executive committee or board of trustees or directors empowering such transfer to be made.

#### § 441. Negotiability of Stock.

Certificates of stock are not negotiable,<sup>88</sup> and, if they are lost or stolen from the owner without fault on his part, it has

<sup>88</sup> *Western Union Telegraph Co. v. Davenport*, 97 U. S. 369, 24 L. Ed. 1047; *George H. Hammond & Co. v. Hastings*, 134 U. S. 401, 10 Sup. Ct. 727, 33 L. Ed. 960; *National Safe Deposit Savings & Trust Co. v. Hibbs*, 32 App. D. C. 459; *Clark v. American Coal Co.*, 86 Iowa, 436, 53 N. W. 291, 17 L. R. A. 557; *Harris v. Bank of Mobile*, 5 La. Ann. 538; *Watson v. Sidney F. Woody Printing Co.*, 56 Mo. App. 145; *Hawes v. Gas Consumers' Ben. Co.* (Com. Pl.) 9 N. Y. Supp. 490; *Weaver v. Barden*, 49 N. Y. 286; *Citizens' National Bank v. Cincinnati, New Orleans & Texas Pacific Ry. Co.* (Super. Ct. Cin.) 11 Wkly. Law Bul. 86, 9 Ohio Dec. 147; *Young v. South Tredegar Iron Co.*, 85 Tenn. (1 Pickle) 189, 2 S. W. 202, 4 Am. St. Rep. 752.

been held that his right is superior to that of any person who may acquire them by purchase from any holder.<sup>39</sup> This is undeniably the general rule; but when the original owner has been negligent, and by reason of such negligence a certificate of stock, with an assignment on the back signed in blank, has come into the hands of a bona fide holder for value without notice of the loss or theft, the original owner is estopped from asserting his rights; as, for instance, when the true owner has pledged his stock, having first assigned it in blank, and it is afterwards, through a breach of trust, sold to an innocent purchaser.<sup>40</sup> For a full discussion of this subject, the reader is referred to the authorities cited in the note.<sup>41</sup> The Supreme Court of the United States apparently favors the rights of the innocent purchaser in such cases, as against those of the original owner.<sup>42</sup>

<sup>39</sup> *Unity Banking & Saving Co. v. Bettman*, 217 U. S. 127, 30 Sup. Ct. 488, 54 L. Ed. 695; *Bangor Electric Light & Power Co. v. Robinson* (C. C.) 52 Fed. 520; *East Birmingham Land Co. v. Dennis*, 85 Ala. 565, 5 South. 317, 7 Am. St. Rep. 73, 2 L. R. A. 836; *Barstow v. Savage Mining Co.*, 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; *National Safe Deposit Savings & Trust Co. v. Hibbs*, 32 App. D. C. 459; *Blaisdell v. Bohr*, 68 Ga. 56; *Otis v. Gardner*, 105 Ill. 436; *Wells v. Smith*, 7 Abb. Prac. (N. Y.) 261; *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 42 N. E. 988, 51 Am. St. Rep. 700, 31 L. R. A. 779; *Appeal of Given* (Pa. 1888) 16 Atl. 75.

<sup>40</sup> *Thompson v. Toland*, 48 Cal. 99; *Ambrose v. Evans*, 66 Cal. 74, 4 Pac. 960; *National Safe Deposit, Savings & Trust Co. v. Hibbs*, 32 App. D. C. 459; *Honold v. Meyer*, 36 La. Ann. 585; *Jarvis v. Rogers*, 13 Mass. 105; *Walker v. Detroit Transit Ry. Co.*, 47 Mich. 338, 11 N. W. 187; *Gass v. Hampton*, 16 Nev. 185; *Mt. Holly L. & M. Turnpike Co. v. Ferree*, 17 N. J. Eq. (2 C. E. Green) 117; *Leavitt v. Fisher*, 11 N. Y. Super. Ct. (4 Duer) 1; *Krebs v. Forbriger* (Super. Ct. Cin.) 21 Wkly. Law Bul. 313, 10 Ohio Dec. 506; *Appeal of Wood*, 92 Pa. 379, 37 Am. Rep. 694; *State Bank of South Carolina v. Cox*, 11 Rich. Eq. (S. C.) 344, 78 Am. Dec. 458; *Cherry v. Frost*, 75 Tenn. (7 Lea) 1.

<sup>41</sup> 3 Clark & M. Corp. § 595 et seq., and cases cited; 2 Cook, Corp. §§ 472-473, and cases cited; 10 Cyc. 631 et seq., and cases cited.

<sup>42</sup> *Cowdrey v. Vandenburg*, 101 U. S. 572, 25 L. Ed. 923.

§ 442. **Lost Certificates.**

Because of the principles above announced, a corporation should always insist upon the surrender of the old certificate before effecting a transfer.<sup>43</sup> Wherever, however, satisfactory proof has been adduced of the loss of the old certificate, and of the fact that it is unlikely to turn up in the hands of a bona fide purchaser for value, then the corporation may be compelled, upon proper security being given, to issue a new certificate.<sup>44</sup> The new certificate should recite that it is issued in lieu of the lost certificate.<sup>45</sup>

§ 443. **Indemnity Bond.**

The practice is first to require an advertisement for a reasonable length of time, stating the loss, and then to take an indemnity bond from the party claiming the right to the transfer or to the issue of the duplicate certificate, to protect the company against any legal demand which may subsequently be made.<sup>46</sup>

§ 444. **Form of Indemnity Bond.**

Know all men by these presents that we, ....., of ....., as principal, and ....., of ....., as surety, are held and firmly bound unto the ..... Company, a corporation duly created and existing under the laws of the state of ..... and its successors and assigns, in the penal sum of \$....., to be

<sup>43</sup> First Nat. Bank v. Lanier, 11 Wall. (U. S.) 369, 20 L. Ed. 172; Supply Ditch Co. v. Elliott, 10 Colo. 327, 15 Pac. 691, 3 Am. St. Rep. 586; Cleveland & M. R. Co. v. Robbins, 35 Ohio St. 483; 1 Cook, Corp. § 402.

<sup>44</sup> State ex rel. Phillips v. New Orleans Gaslight Co., 25 La. Ann. 413; Kinnan v. Forty-Second St. R. Co., 1 Misc. Rep. 457, 21 N. Y. Supp. 789; Hof v. Western German Bank (Ohio, 1881) 6 Wkly. Law Bul. 665, 697, 8 Ohio Dec. 245; 2 Clark & M. Corp. § 426.

<sup>45</sup> Dill, N. J. Corp. 136, 137.

<sup>46</sup> Guilford v. Western Union Telegraph Co., 43 Minn. 434, 46 N. W. 70; Galveston City Co. v. Sibley, 56 Tex. 269; 10 Cyc. 620.

paid to the said ..... Company, its certain attorney, successors, or assigns, for which payment, well and truly to be made, we bind ourselves and each of us, and our and each of our executors, administrators, and assigns, firmly by these presents.

In testimony whereof we have hereunto signed our names and affixed our seals this ..... day of ....., A. D. 19...

Whereas, the said ..... has satisfied the said company that he is the legal owner of certificate numbered ....., for ..... shares of the (insert "common" or "preferred," as the case may be) capital stock of said company, but that the same has been lost; and the said company has therefore issued to said ..... a certificate for a like number of shares of the same class of stock in said company in lieu of said lost certificate:

Now, therefore, the condition of the above obligation is such that if the above bounden ....., and his heirs, executors, administrators, and assigns, shall at any and all times hereafter indemnify and save harmless the said ..... Company, and its successors and assigns, against any and all actions, proceedings, claims, and demands which may be brought or made against said company in consequence of its having issued such new certificate as aforesaid, or in consequence of its permitting at any time hereafter a transfer of said shares or any of them without the protection of the original certificate aforementioned; and shall also deliver or cause to be delivered up to said company the said missing certificate for cancellation if the same shall hereafter be found; and shall also reimburse said company for any and all expenses which may be incurred by it in consequence of any of the aforementioned matters; then this obligation to be null and void; otherwise to be and remain in full force and effect.

..... [Seal.]

..... [Seal.]

Signed, sealed and delivered in the presence of

.....

## CHAPTER XXII

## BONDED INDEBTEDNESS

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## § 445. Creating Bonded Indebtedness.

A corporation has inherent power to issue bonds for the payment of money, and no express power need be given to that end.<sup>1</sup> At common law the board of directors may authorize the creation of this class of indebtedness, secured by mortgage of the corporate property, without any authorization by the stockholders for this purpose.<sup>2</sup> A stockholders' meeting for the purpose of giving this authority is customary, but not necessary.<sup>3</sup> In some places statutes require the action of the stockholders.<sup>4</sup> Bonds, unlike stock, may be issued for less than par, in the absence of fraud.<sup>5</sup>

## § 446. Rights of Bona Fide Holder.

A *bona fide* holder of corporate bonds for value before maturity takes them free from all infirmities in their origin, un-

<sup>1</sup> *White Water Valley Canal Co. v. Vallette*, 62 U. S. (21 How.) 414, 16 L. Ed. 154; *City of Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *Commonwealth v. Smith*, 92 Mass. (10 Allen) 448, 87 Am. Dec. 672; *Commissioners of Craven Superior Court v. Atlantic & N. C. R. Co.*, 77 N. C. 289; *Baldwin v. Hillsborough & C. R. Co.*, 1 Ohio Dec. 546, 10 Western Law J. 356; *McMasters v. Reed's Ex'rs*, 1 Grant, Cas. (Pa.) 36; 3 Cook, Corp. § 762, and notes; 10 Cyc. 1167 et seq.

<sup>2</sup> *Hodder v. Kentucky & G. E. R. Co. (C. C.)* 7 Fed. 793; *Bank Com'rs v. Bank of Brest, Har. (Mich.)* 106; *Hendee v. Pinkerton*, 96 Mass. (14 Allen) 381; *Hoyt v. Thompson's Ex'r*, 19 N. Y. 207; 3 Cook, Corp. § 808, and note; 3 Clark & M. Corp. § 691c, and notes. See chapter XV, § 320.

<sup>3</sup> 3 Cook, Corp. § 808, and note; *Dill, N. J. Corp.* 4. See 3 Clark & M. Corp. § 696, and notes.

<sup>4</sup> Code of Law 1901 D. C. § 607.

<sup>5</sup> *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527; *Traders' Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 3 S. E. 363; *Northside Ry. Co. v. Worthington*, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778; 3 Cook, Corp. § 776, and note; 10 Cyc. 1169.

less they are absolutely void for want of power in the corporation to issue them, or their circulation is by law prohibited by reason of the illegality of the consideration.<sup>6</sup>

### § 447. Classes of Bonds.

Bonds may be either registered, in which case they are transferable only by assignment duly registered on the books of the company or its registrar, and the principal and interest upon them are payable to the registered owner or his assigns by check or in cash; or coupon, in which case they have attached to them a series of coupons, each representing the installment of interest due at the respective interest periods, which coupons are payable to bearer. Coupon bonds, as well as the coupons themselves, usually pass from hand to hand by delivery. Coupon bonds are, however, sometimes registered. In that event the principal of the bond is payable only to the registered owner or his assignee. Bonds may be, and generally are, secured by mortgage, but they may be entirely unsecured.

### § 448. Form of Registered Bond.

United States of America.

State of .....

..... Company.

Registered Twenty Year Five Per Cent. Gold Bond.

\$.....

No. ....

Know all men by these presents, that the ..... Company, a corporation created and existing by virtue of the laws of the state of ....., for value received, hereby promises to pay to (fill in name of registered owner) or registered assignee on the first day

<sup>6</sup> *Cromwell v. Sac County*, 96 U. S. 51, 24 L. Ed. 681; *Macon County v. Shores*, 97 U. S. 272, 24 L. Ed. 889; *Union Loan & Trust Co. v. South California Motor Road Co.* (C. C.) 51 Fed. 840; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Harrison v. Annapolis & E. R. Co.*, 50 Md. 490; *Sykes v. Mayor, etc., of Town of Columbus*, 55 Miss. 115; *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. (1 Halst. Ch.) 633, 45 Am. Dec. 401; *Adams v. Memphis & L. R. Co.*, 42 Tenn. (2 Cold.) 645.

of ....., A. D. 19.., at the office of the National Trust Company, in the city of ....., state of ....., the sum of one thousand (\$1,000.00) dollars in gold coin of the United States of America, of the present standard of weight and fineness, and to pay interest thereon from the first day of ....., A. D. 19.., at the rate of five (5) per cent. per annum; such interest to be payable to the registered owner hereof at the office aforesaid, in like gold coin, semiannually, on the first days of ..... and ..... in each year.

All payments upon this bond, both of principal and interest, shall be made without deduction of any tax or assessment which the said obligor, or its successors or assigns, may pay or be required to pay, deduct, or retain under any law or regulation heretofore or hereafter enacted by the United States, or any political community whatever.

This bond is one of a series of two hundred (200) of like form, tenor, effect, amount, and date, and numbered consecutively from one (1) to two hundred (200), both inclusive, which said series of bonds is limited in amount to two hundred thousand (\$200,000.00) dollars, and is issued in pursuance of, and in accordance with, the terms of, and is secured by, a certain trust deed or mortgage of even date herewith, duly executed by said obligor to the National Trust Company as trustee, conveying by way of security the property hereinafter described, to wit: (Insert brief description of property.)

This bond and said trust deed or mortgage securing same were duly authorized by the stockholders and board of directors of the obligor company at meetings of said stockholders and directors respectively duly convened and held at ..... on the ..... day of ....., A. D. 19...

In case of default in payment of the principal or any installment of interest due hereunder for a period of six months after the same shall respectively mature, the property secured by said trust deed or mortgage may be sold, and the proceeds applied towards the payment of this series of bonds in the manner specified in said trust deed or mortgage. No recourse shall be had for the payment of the principal or any installment of interest of or upon this bond, against any stockholder, officer, or director of the obligor company.

This bond is transferable only on the books of said National Trust Company upon the surrender and cancellation of this bond, and thereupon a new registered bond will be issued to the transferee in exchange therefor.

This bond shall not become or be valid until authenticated by the certificate indorsed hereon, duly executed by the said National Trust Company, the trustee named in said trust deed or mortgage.

In witness whereof the obligor company has caused these presents

' to be signed in its corporate name by its president, and its corporate seal to be hereunto affixed, attested by its secretary, at the city of ..... this ..... day of ....., A. D. 19...

..... Company,

By .....,

[Corporate Seal]

President.

Attest: .....,

Secretary.

### *Trustees' Certificate.*

This is to certify that this bond is one of a series of two hundred (200) bonds described in the trust deed or mortgage therein mentioned.

National Trust Company,

By .....,

Trust Officer.

### § 449. Form of Coupon Bond.

United States of America.

State of .....

..... Company.

Twenty Year Five Per Cent. Gold Coupon Bond.

\$1,000.00.

No. ....

Know all men by these presents that the ..... Company, a corporation created and existing by virtue of the laws of the state of ....., for value received, hereby promises to pay on the ..... day of ....., A. D. 19.., at the office of the National Trust Company, in the city of ....., state of ....., to the bearer, or, if registered, to the registered holder of this bond, the sum of one thousand (\$1,000.00) dollars in gold coin of the United States of America, of the present standard of weight and fineness, and to pay interest thereon from the first day of ....., A. D. 19.., at the rate of five (5) per cent. per annum; such interest to be payable at the office aforesaid, in like gold coin, semiannually, on the first day of ..... and ..... in each year, but only upon presentation and surrender of the respective interest coupons hereto attached as they severally mature.

All payments upon this bond, both of principal and interest, shall be made without deduction of any tax or assessment which the said obligor, or its successors or assigns, may pay or be required to pay, deduct, or retain under any law or regulation heretofore or hereafter enacted, by the United States, or any political community whatsoever.

This bond is one of a series of two hundred (200) of like form, tenor, effect, amount, and date, and numbered consecutively from one (1) to two hundred (200), both inclusive, which said series of

bonds is limited in amount to two hundred thousand (\$200,000.00) dollars, and is issued in pursuance of, and in accordance with the terms of, and is secured by, a certain trust deed or mortgage of even date herewith, duly executed by said obligor to the National Trust Company as trustee, conveying by way of security the property hereinafter described, to wit: (Insert brief description of property.)

This bond and said trust deed or mortgage securing the same were duly authorized by the stockholders and board of directors of the obligor company at meetings of said stockholders and directors, respectively, duly convened and held at ..... on the ..... day of ....., A. D. 19...

In case of default in payment of the principal or any installment of interest due hereunder for a period of six months after the same shall respectively mature, the property secured by said trust deed or mortgage may be sold, and the proceeds applied towards the payment of this series of bonds in the manner specified in the said trust deed or mortgage. No recourse shall be had for the payment of the principal or any installment of interest of or upon this bond against any stockholder, officer, or director of the obligor company.

This bond shall be transferable by delivery, unless registered in the owner's name on the books of said National Trust Company, such registry being noted on the bond by said trust company, after which no transfer shall be valid unless made on the said books and likewise noted on the bond; but the same may be again made transferable by delivery by being registered on said books in the name of bearer. Registration, however, shall not affect the transferability of the coupons hereto attached by delivery merely; and the payment to the bearer of any of such coupons shall discharge the obligor in respect of the interest therein mentioned, whether the bond shall have been registered or not.

Neither this bond, nor any coupon for interest thereon, shall become or be valid until authenticated by the certificate indorsed hereon, duly executed by the said National Trust Company, the trustee named in said trust deed or mortgage.

In witness whereof the obligor company has caused these presents to be signed in its corporate name by its president, and its corporate seal to be hereunto affixed, attested by its secretary, and coupons for such interest, bearing the engraved fac simile signature of its treasurer, to be attached hereto, at the city of ....., this ..... day of ....., A. D. 19...

..... Company,

By .....,

President.

[Corporate Seal.]

Attest: .....,

Secretary.

*Form of Interest Coupons.*

(Forty in Number.)

\$25.00.

No. ....

This coupon for twenty-five (\$25.00) dollars, gold coin of the United States of America, is payable to bearer on the first day of ....., A. D. 19.., at the office of the National Trust Company in the city of ....., state of ....., without deduction for taxes, for six months' interest due on that day on its one thousand (\$1,000.00) dollar twenty year five (5) per cent. gold bond No. ...., subject to the terms of said bond, and the trust deed or mortgage therein mentioned.

..... Company,

By .....,

Treasurer.

(Note.—The certificate of the trustee under the mortgage will be indorsed as in form above.)

## § 450. Definitions of Bonds.

The data for the following brief descriptions of various classes of bonds in common circulation are principally taken from the useful work entitled "Money and Investments" by Montgomery Rollins:

## § 451. Collateral Mortgage Bonds.

Secured by a deposit of bonds, which in turn are secured by mortgage. This title is much abused, as frequently these bonds are secured by deposit of stock only.

## § 452. Collateral Trust Bonds.

Secured by depositing in trust securities of other companies. They may be indirectly first liens by reason of the fact that the deposited securities are such.

## § 453. Consolidated First Mortgage Bonds.

This term usually has the meaning of "first and consolidated mortgage bonds," for which see section 466.

**§ 454. Consolidated Mortgage Bonds.**

Secured by a mortgage on the entire property formed by the consolidation of several smaller properties. This term distinguishes such issue from divisional bonds, or mortgages on the various individual properties which were consolidated.

**§ 455. Convertible Bonds.**

Such as are convertible under given conditions at a fixed rate into other securities of the same corporation.

**§ 456. Convertible Collateral Trust Bonds.**

Collateral trust bonds secured by collaterals, which may be changed from time to time for other collaterals, subject to the consent, usually, of the trustee.

**§ 457. Debenture Bonds.**

Are usually nothing more than unsecured notes, in coupon form, having precedence over preferred and common stocks. Debenture mortgage bonds are secured by mortgage.

**§ 458. Deferred Bonds.**

Carry gradually increasing rate of interest up to a given rate, after which the rate is uniform.

**§ 459. Equipment Bonds.**

Are secured by mortgage of cars, locomotives, and other equipment.

**§ 460. Extended Bonds.**

Are bonds upon which payment of principal has been postponed, but the bonds have not been replaced by others. Security remains same; interest usually reduced.

**§ 461. Extension Bonds.**

Secured by mortgage (usually first) of an extension of a railroad; usually guaranteed by road constructing extension; often secured by junior mortgage on other property in addition.

**§ 462. First and General Mortgage Bonds.**

Secured by general mortgage on all property, and first mortgage on some property. First general mortgage bonds are simply first in point of time of issue of all general mortgage bonds.

**§ 463. First and Refunding Mortgage Bonds (or Refunding First Mortgage Bonds).**

Take the place of a first mortgage issue, which the company refunds, or takes up, by a new issue.

**§ 464. First Refunding Mortgage Bonds.**

(Usually) the first issue of refunding bonds, and not in any sense, necessarily, first mortgage bonds.

**§ 465. First Consolidated Mortgage Bonds.**

Usually the first issue of consolidated mortgage bonds, and are not necessarily secured by first mortgage.

**§ 466. First and Consolidated Mortgage Bonds.**

Are consolidated bonds which are first liens on such of the property of the company as was not previously mortgaged.

**§ 467. First Mortgage Trust Bonds.**

Secured by deposit in trust of other bonds, which are themselves secured by first mortgage.

**§ 468. Funding and Real Estate Mortgage Bonds.**

Small issue secured by mortgage (usually first) on a portion of the company's real estate.

**§ 469. General Mortgage Bonds.**

Secured by mortgage on properties subject to earlier incumbrances; usually provide sufficient funds to take up earlier bonds when due, thus arranging eventually to become a first lien.

**§ 470. Guaranteed Bonds.**

Guaranteed by indorsement (usually) on the bond, by another company; may apply to principal, interest, or both.

**§ 471. Improvement Mortgage Bonds.**

Usually a junior mortgage to cover improvements; sometimes provides to become first mortgage, by arranging for the taking up of prior incumbrances.

**§ 472. Income Bonds.**

(Undesirable.)<sup>7</sup> Usually secured by pledge of net earnings after payment of interest and a proportional amount toward the sinking fund of prior incumbrances.

**§ 473. Interchangeable Bonds.**

Those which may be changed from coupon to registered, and vice versa.

**§ 474. Participating Bonds.**

Secured by mortgage on specific property. Holder, in addition to interest, shares profits accruing to issuing company from ownership of shares in other companies.

<sup>7</sup> *Corcoran v. Chesapeake & Ohio Canal Co.*, 1 MacArthur (D. C.) 358.

§ 475. **Prior Lien Bonds.**

Should take precedence of all other liens; are to be scrutinized carefully, to ascertain if a right of priority really is secured to them as to all incumbrances, or only as to some.

§ 476. **Deed of Trust Securing Bonds.**

Much of the practical value of bonds depends upon the care with which the deed of trust securing them is prepared. The insertion or failure to insert certain provisions in this instrument may very materially affect the market value of the securities. The following form has stood the test of litigation and may be commended:<sup>s</sup>

§ 477. **Form of Deed of Trust.**

This indenture, made this ..... day of ....., A. D. 19.., by and between the X. Y. Z. Company, Incorporated, a corporation duly created and existing under and by virtue of the laws of the state of Virginia, hereinafter called the mortgagor, party of the first part, and the National Trust Company of the District of Columbia, a corporation duly created and existing under and by virtue of the laws of the United States applicable to the District of Columbia, hereinafter called the trustee, party of the second part.

Whereas, the mortgagor is duly empowered by the laws of the state of Virginia, under which it was incorporated, to create a bonded indebtedness, to be secured by lien on any of its property and franchises, provided the creation of such bonded indebtedness be sanctioned by a vote of a majority in amount of all the stockholders in said corporation having voting power, present or represented and voting at a meeting of the stockholders duly called for that purpose; and

Whereas, for the purpose of making payment for the real estate purchased by said mortgagor, in order to carry on its corporate functions, at a meeting of the stockholders of said mortgagor, called and held pursuant to law on the ..... day of ....., A. D. 19.., at which meeting more than a majority in amount of all the stockholders having voting power voted in favor of the resolu-

<sup>s</sup> Parsons v. Little, 28 App. D. C. 218.

tion hereinafter recited, the following resolution was duly passed by said stockholders:

"Be it resolved that, in order to make payment for the real estate purchased by this company, it is necessary and expedient that this company issue its certain mortgage bonds, hereinafter more particularly described, and that the payment of the same with interest, when executed, issued, and outstanding as hereinafter set forth, shall be equally secured, without preference, by a mortgage or deed of trust of and upon all the franchises, property, real estate, plant, machinery, and equipment, now owned, or which may be hereafter acquired or installed, by this company, and the rents, incomes, and profits thereof, to be executed to the National Trust Company of the District of Columbia, as trustee, said bonds to bear date on the ..... day of ....., 19...

"And be it further resolved, that the board of directors of this company be, and they are hereby, authorized, empowered, and directed to cause to be executed and issued, and the president, secretary, treasurer, and other officers of this company be, and they are hereby, authorized and directed to sign, seal, execute, and deliver in accordance with the direction of the board of directors of this company, mortgage bonds of this company, to be known as 'first mortgage bonds,' of the denomination of one thousand (\$1,000) dollars each, to the aggregate amount of two hundred thousand (\$200,000) dollars principal, and bearing interest at the rate of five (5%) per cent. per annum from the date thereof until paid, payable semi-annually, said principal to be payable twenty years from the date of said bonds, and said principal and interest to be payable to the registered owner or owners thereof, in gold coin of the United States of America, of the present standard of weight and fineness, which said bonds shall, as to both principal and interest, be a first lien until paid upon all the franchises, property, real estate, and equities therein, plant, machinery, and equipment, now owned or which may be hereafter acquired or installed by this company, and the rents, incomes, and profits thereof.

"And be it further resolved, that the form of said bonds and the mortgage or deed of trust to secure the same, and all the terms, provisions, covenants, conditions, and agreements thereof, shall be prescribed by, satisfactory to, and subject to the authority and direction of the board of directors of this company in all respects; and that in all things pertaining to the form, execution, issue, and delivery of said bonds, and of the mortgage or deed of trust securing the same, the acts, resolutions, and directions of the board of directors of this company shall be taken and held to be the acts,

resolutions, and directions of the stockholders and of this company, and of the same effect, virtue, and force in law or otherwise.

"And be it further resolved, that the negotiation of said bonds, and all of them, and the price at which the same shall be negotiated, sold, disposed of, or delivered, shall be subject to the direction of the board of directors of this company; and that said bonds, and each and all of them, shall be, and be held to be, lawfully issued and outstanding in whosoever's hands the same may come, when and as the same shall be ordered or authorized to be issued, negotiated, and delivered by the board of directors of this company."

And whereas, the board of directors of the mortgagor in lawful meeting assembled on the ..... day of ....., 19.., unanimously adopted the following resolution:

"Be it resolved, by the board of directors of this company, by virtue of and in pursuance of the powers, duties, and authority conferred upon this board by the charter of this company, the laws of the state of Virginia, and certain resolutions of the stockholders of this company adopted on the ..... day of ....., 19.., touching the issue of certain bonds by and on behalf of this company as follows:

"That the first mortgage bonds so as aforesaid authorized and directed by the stockholders of this company to be issued by and in the name of this company be divided into and consist of two hundred (200) bonds of the denomination of one thousand (\$1,000.00) dollars each, numbered from one (1) to two hundred (200), both inclusive; and that the principal and interest of said bonds, and each and all of them, be made payable at the office of the National Trust Company of the District of Columbia.

"And be it further resolved, that the form of said bonds so as aforesaid authorized and directed to be issued by and on behalf of this company shall be substantially as follows: (Insert form of bond.)

"And be it further resolved, that the president and secretary of this company be, and they are hereby, authorized, empowered, and directed, for, on behalf of, and in the name of this company, to sign as such president and secretary respectively, 'first mortgage bonds' of the tenor and effect, in the substantial form, and of the aggregate amount hereinbefore set forth, and as set forth in the resolutions of the stockholders of this company pertaining to the issue of said bonds, adopted on the ..... day of ....., 19.., and to affix the corporate seal of this company to each of said bonds, and, when so executed, to deliver the same to said trustee for certification as therein set forth; and that said trustee

may and shall, after executing the trustee's certificate on each and all of said bonds indorsed, redeliver the same to the officers of this company to be disposed of and issued under the direction of its board of directors."

And whereas, at said meeting of the board of directors, the form of these presents being then and there submitted for consideration, the following resolution was unanimously adopted:

"Be it resolved, that the form of the mortgage or deed of trust purporting to secure the first mortgage bonds heretofore authorized and directed to be issued by this company, and here and now submitted to the board of directors of this company, be, and the same is hereby, approved and adopted, together with all and singular its terms, provisions, covenants, conditions, and agreements, as the act, direction, and resolution of this board, as fully as if the same were herein set forth and adopted severally and at length; and that such mortgage or deed of trust be made and executed by this company, under its corporate name, subscribed by its president and sealed with its corporate seal, thereunto affixed and attested by its secretary, and, when so executed, said mortgage or deed of trust shall be duly acknowledged by the attorney named therein, so as to enable it to be recorded under the laws of the District of Columbia or of any state, territory, or political community; and that when duly acknowledged it shall be recorded; and that the president, secretary, and other proper officers of this company be, and they are hereby, authorized, empowered, and directed to do, or cause to be done, all acts and things necessary and proper to carry into effect the objects and purposes expressed in the resolutions of this board and of the stockholders of this company touching the execution of said bonds, and to perfect the same and the mortgage or deed of trust securing the same:"

Now, therefore, this indenture witnesseth that the X. Y. Z. Company, Incorporated, party of the first part, for and in consideration of the premises and of the sum of five (\$5.00) dollars by the party of the second part unto it paid at or before the execution or delivery of these presents, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of each and all of the aforesaid bonds, according to their true and lawful tenor and effect, and to secure the strict performance of all the covenants and conditions of these presents, has granted, bargained, and sold, transferred, enfeoffed, and conveyed, and does by these presents grant, bargain, and sell, transfer, enfeoff, and convey unto the National Trust Company of the District of Columbia, party of the second part, its successors and assigns, forever, upon the trusts,

uses, terms, conditions, and covenants herein set forth, all and singular the following described real estate, personal property, rights and franchises; that is to say: (Here insert description of property.)

And also all and singular the improvements upon said real estate, of whatever kind, sort, or description, and all and singular the plant, machinery, and improvements thereon, and the equipment, machines, tools, furniture, fixtures, and appliances, and all other property whatsoever, whether real or personal, of said mortgagor, now owned or which may be at any time in the future acquired or installed by said mortgagor, and all rents, issues, and profits thereof.

And also all the corporate rights of said mortgagor, and all other rights and franchises now owned or held, or which may at any time hereafter be acquired or gained, by said mortgagor.

And all the estate, right, title, and interest of said mortgagor in and to the aforementioned real and personal property, rights, and franchises, and all or any part thereof.

To have and to hold the aforesaid real and personal property, and the rights, franchises, estates, and appurtenances hereby assigned and conveyed, or intended to be assigned and conveyed, unto and to the said trustee, its successor, or assigns, forever.

But in trust and confidence, nevertheless, for the equal and proportionate benefit and security of the holders of all the bonds hereinbefore mentioned, and intended to be secured hereby, equally and without preference or priority, without regard to the time of the issue or negotiation thereof, or by reason of any other thing whatsoever, and for the uses and purposes, and upon the trusts, in this indenture set forth and declared, and subject to all the conditions, terms, covenants, and agreements of these presents, and with the authority and powers herein granted and given.

Provided, however, that if the said mortgagor shall well and truly pay the principal and interest of each and all of said bonds, according to the true and lawful tenor and effect thereof, and shall well and truly keep and perform all of the covenants, conditions, terms, and agreements of these presents, then these presents shall be void, and the estates hereby granted shall cease and determine; but otherwise the same shall be, remain, and continue to be of full force, effect, and virtue in law and otherwise.

And it is hereby mutually covenanted, agreed, and declared by and between the parties hereto, to and with each other, respectively, for themselves, their successors, and assigns, and for the holders, from time to time, of the aforesaid bonds, that the said bonds, and each and all of them, are to be executed, issued, negotiated, and held, and that the hereby mortgaged property, rights, and fran-

chises are to be conveyed to and held by said trustee as security for said bonds, subject to the following uses, trusts, terms, conditions, covenants, agreements, powers, and duties, and it is hereby covenanted and agreed by and between the parties hereto as follows; that is to say:

First. All of said bonds intended to be secured by these presents shall be executed by said mortgagor and delivered by it to said trustee for certification, as provided by the terms of said bonds; and thereupon said trustee shall certify the same and deliver said bonds, when so certified, and each and all of them, back to the proper officers of said mortgagor to be issued and negotiated by it, as hereinbefore set forth. No such bond or bonds shall be entitled to any benefit, lien, or security hereunder, unless the same shall have indorsed thereon the certificate of said trustee, as herein and therein provided; but every such certificate of said trustee, so indorsed upon any such bond, executed by and on behalf of said mortgagor, shall be conclusive evidence that the bond so certified has been issued hereunder, and is entitled to the benefit of the lien and trust hereby created. All such bonds shall, together with the lien and security of these presents, take effect from the date of these presents, without regard to the date of the actual issue, sale, or disposition of any of said bonds, and as though upon the day of such date all such bonds had been actually issued and delivered to, and were in the hands of, innocent holders for value.

Second. Until the bonds intended to be secured hereby can be engraved and prepared, the mortgagor may execute and deliver, and the trustee shall certify, written, printed, or lithographed bonds substantially of the tenor of the bonds hereinabove recited. All such written, printed, or lithographed bonds shall bear upon their face the words, "Temporary bond issued under and secured by the mortgage bearing date . . . . ., 19.., to the National Trust Company of the District of Columbia, as trustee, and exchangeable for engraved bonds when issued." Any such bond shall be certified by the trustee in the same manner as the bonds hereinbefore described, and such certificate shall be conclusive evidence that the bond so certified has been duly issued under this indenture, and that the holder thereof is entitled to the benefit of the trust hereby created.

Third. Such temporary bonds, issued and certified as aforesaid, shall be exchangeable for engraved bonds to be issued under and secured by this indenture, and upon any such exchange said temporary bonds shall be forthwith canceled by the trustee and de-

livered to the mortgagor for destruction. Until so exchanged, said temporary bonds shall in all respects be entitled to the lien and security of this indenture as bonds issued and certified hereunder. As long as any temporary bonds are outstanding, a corresponding amount in face value of permanent bonds shall not be certified by the trustee.

Fourth. On request of the mortgagor the trustee shall certify temporary or permanent bonds, and shall deliver the same pursuant to the terms of this article, whether or not this indenture shall have been recorded.

Fifth. In case any bond issued hereunder shall be lost, destroyed, or mutilated, the mortgagor may in its discretion issue, and the trustee shall thereupon authenticate, a new bond of like tenor and date in exchange and substitution for the bond mutilated, upon cancellation thereof, or in substitution for any bond destroyed or lost, upon filing with the trustee satisfactory evidence that such bond was destroyed or lost, and furnishing the mortgagor and the trustee with satisfactory indemnity.

Sixth. Until default shall be made in the due and effectual performance of some covenant or condition hereof, obligatory upon or undertaken by said mortgagor, it, said mortgagor, its successor and assigns, shall be suffered and permitted to retain possession of all the property and franchises hereby conveyed, and to manage, operate, and use the same, and each and every part thereof, with all the rights and franchises appertaining thereto, and to collect, receive, take, use, and enjoy the tolls, earnings, income, rents, issues, and profits thereof.

Seventh. If, at any time or times during the existence of these presents, it shall be deemed advisable by the board of directors of said mortgagor to sell or dispose of any part of the plant, tools, appliances, machinery, and equipment hereby conveyed, for the purpose of replacing the same with other or better tools, appliances, machinery, and equipment, then, provided such tools, appliances, machinery, and equipment are detached or are capable of being detached from the real estate or the improvements thereon, without permanent damage to the same, said trustee shall be, and is hereby authorized and empowered, on the written request of said mortgagor, to enter into and execute a release or releases of the same from the operation and lien of these presents, provided the proceeds of the sale of the same shall be held as a special fund by said mortgagor, and shall be forthwith reinvested in the purchase of or payment for such substituted tools, appliances, machinery, and equipment, as hereinbefore set forth, and, if not so used and applied,

shall be held by said mortgagor for the equal and proportionate benefit of the holders of the bonds so as aforesaid authorized to be issued as herein set forth, and as security for the payment of the same, but without any obligation on the part of any purchaser or purchasers to see to the application of the purchase money thereof.

Eighth. In case said mortgagor shall erect, construct, or install any new improvement upon or to the real and personal estates and property hereby conveyed, or any addition or betterments to the machinery, plant, tools, appliances, and equipment, now owned by said mortgagor, and intended to be conveyed hereby, whether such changes, additions, or improvements shall be by way of substitution for any of the now existing machinery, plant, tools, appliances, and equipment of said mortgagor, or by way of additions thereto, the same shall be and become forthwith subject to the lien and incumbrance of these presents, and of the bonds, and the interest thereupon, intended to be secured hereby, just as though the same were, at the time of the execution of these presents, owned by said mortgagor, and erected or installed upon, and a part of, the real estate, machinery, plant, tools, appliances, and equipment hereby conveyed, or intended to be conveyed; and if and when required or requested so to do by said trustee, said mortgagor shall and will execute such further assurances or conveyances of such additions, betterments, or substitutions to and for said machinery, plant, tools, appliances, and equipment of it, said mortgagor, as may be necessary to subject the same to the lien of these presents, and of said bonds, and the interest thereupon, intended to be secured hereby. Said mortgagor also hereby covenants for itself, its successors and assigns, that it will make, execute, and deliver all such further deeds, instruments, conveyances, and assurances of the property hereby conveyed, or intended to be conveyed, and of each and every part hereof, as may be necessary, or as said trustee may require, and particularly that it, said mortgagor, its successors and assigns, will make and execute all necessary deeds, conveyances, and other instruments, and do or cause to be done all acts and things, that may be necessary and proper to secure to, and vest in, said trustee all the property, rights, and franchises, of whatsoever kind, hereby conveyed or intended to be conveyed, whether the same be now owned and held by said mortgagor, or shall be acquired, gained, constructed, installed, or owned by it, said mortgagor, its successors and assigns, at any time in the future, to the end that title to the same may inure to, and be vested in, said trustee, for the benefit and security of the bonds and the coupons thereon, intended to be secured thereby, as fully and effectually, to all intents and purposes, as

if the same were now existing in possession of said mortgagor, and hereby expressly conveyed.

Ninth. Said mortgagor shall and will at all times maintain and keep in first-class condition and efficient state, and ready for operation, all the property, improvements, plant, machinery, tools, appliances, and equipment hereby conveyed or intended to be conveyed.

Tenth. Said mortgagor shall and will at all times keep the property hereby conveyed insured, according to its nature, to the full value thereof; and said policies of insurance shall be so indorsed that loss, if any, occurring thereunder, shall be payable to said trustee for the equal and pro rata benefit of all the bonds intended to be secured hereby, according to the true and lawful priority of the same in their respective series, and whether such policies be so indorsed or not, the amount of any loss occurring and paid thereunder, shall be payable to said trustee, as aforesaid; but if, at the time of the happening and payment of any such loss under any policy of insurance, said mortgagor shall be without default, to the knowledge of said trustee, in the performance of any of the covenants herein on its part contained, then said trustee is hereby authorized to make payment of the amount of such loss, so as aforesaid payable to it, said trustee, to said mortgagor. And said mortgagor shall and will use and expend such sum of money so paid to it upon the rehabilitation and repair of the property, on account of damage to which payment has been made under any such policy of insurance. But if said mortgagor shall at any time, and from time to time, set aside out of its earnings an insurance fund, for the purpose of itself assuming the risks against which it would otherwise procure insurance from other parties, it, said mortgagor, shall have the right to substitute such insurance fund, so far as the same will go, in the place and stead of the policies of insurance hereinbefore provided for, upon depositing said insurance fund, or transferring the securities in which the same may be invested, to said trustee, to be held by it for the purpose of securing the payment of all of the bonds hereby intended to be secured, and of repairing and making good any loss or damage to the property of said mortgagor hereby conveyed, in case such property shall have been damaged by causes which would otherwise have been covered and insured against by such policies of insurance.

Eleventh. The mortgagor covenants that it will duly and punctually pay the principal and interest of every bond issued hereunder and secured hereby, at the dates and the places and in the manner specified in such bonds, according to the true intent and

meaning thereof, without deduction from either principal or interest for any tax or taxes imposed by the United States, or by any state, county, or municipality, and which the mortgagor may be required to pay or to retain therefrom, under or by reason of any present or future law. At all times, until the payment in full of the principal of the bonds secured by this indenture, the mortgagor will keep an office or agency in the city of ....., in the state of ....., and from time to time the mortgagor will give written notice to the trustee of the location of such office or agency.

Twelfth. The mortgagor covenants and agrees that it shall and will from time to time pay and discharge, before the same shall fall into arrears, all taxes, water rates, assessments, and governmental charges lawfully imposed upon the franchises and lands and other hereby mortgaged property, or any part thereof, the lien of which might or could be held to be superior to the lien hereof, and will pay and discharge all claims of every kind and nature which may hereafter become a lien upon the hereby mortgaged property, or any part thereof, prior to the lien hereof, so that the priority of this mortgage may be duly preserved, and will keep said mortgaged property and all parts thereof in good order and repair, and shall not or will not create or suffer to be created any mechanic's, laborer's, or other lien or charge whatsoever upon the mortgaged property or any part thereof which might or could be impaired prior to the lien of these presents until the bonds hereby secured, with all interest accrued thereon, shall be fully paid and satisfied.

Thirteenth. It is further covenanted and agreed that the said mortgagor shall well and truly pay or cause to be paid all prior liens and indebtedness of whatsoever nature and description that now exist against the property covered by this mortgage or deed of trust prior to the maturity of the principal sum due on said bonds, and the said mortgagor does hereby agree to procure a release thereof from the holders of said lien or said indebtedness; but no duty to see to such payment or the procuring of such release is hereby imposed on the trustee.

Fourteenth. In case default shall be made in the payment of any interest on any bond or bonds hereby secured and outstanding, or in the payment of any other sum as provided in this indenture, or in the performance of any covenant herein stipulated for, and any such default shall have continued for the period of six months, then, and in every case of such continuing default, the trustee may, and upon the written request of the holders of a majority in amount of the bonds hereby secured and then outstanding shall, by notice

in writing delivered to the mortgagor, declare the principal of all the bonds hereby secured and then outstanding to be due and payable immediately; and upon any such declaration the same shall become and be due and payable immediately, anything in this indenture or in said bonds to the contrary notwithstanding.

Fifteenth. This provision, however, is subject to the condition that if, at any time after the principal of said bonds shall have been so declared due and payable, all arrearages upon such bonds, with interest at the rate of five per centum per annum on overdue installments of interest, shall either be paid by the mortgagor or be collected out of the mortgaged premises, and all things theretofore in default by said mortgagor shall have been done before any sale of the mortgaged premises shall have been made, then and in every such case the holders of a majority in amount of the bonds hereby secured then outstanding, by written notice to the mortgagor and to the trustee, may waive such default and its consequences; but no such waiver shall extend to or affect any subsequent default, or impair any right consequent thereon.

Sixteenth. In case (1) default shall be made in the payment of any interest on any bond hereby secured, and any such default shall continue for a period of six months; or in case (2) default shall be made in the due and punctual payment of the principal of any bond hereby secured for a period of six months; or in case (3) default shall be made in the due observance or performance of any other covenant or condition herein required to be kept or performed by the company, and any such default shall continue for a period of six months after written notice thereof to the mortgagor and to said National Trust Company of the District of Columbia from the trustee or from the holders of a majority in amount of the bonds hereby secured, then and in every such case the trustee, in its discretion, with or without foreclosure proceedings:

(a) May enter into and upon all or any part of the mortgagor's real estate, plants, and all other property hereby conveyed to the trustee, or which may at any time become subject to this indenture, and each and every part thereof, and may exclude the mortgagor therefrom, and, having and holding the same, may use, operate, manage, and control the mortgagor's plants and other properties, manufacture and sell any and all articles produced by the mortgagor in its business, execute any and all contracts and make new contracts, and in general carry on and conduct the business of said company as fully as it might do if in possession thereof; and upon every such entry the trustee, at the expense of the trust estate, from time to time, either by purchase, repairs, or construction, may maintain and restore,

and insure, or keep insured, the plants, machinery, tools, appliances, and all other chattels and personal property provided for use in connection with said business of the mortgagor whereof it shall have become possessed as aforesaid, and in the same manner and to the same extent as is usual with manufacturing companies, at the expense of the trust estate, and make all necessary and proper repairs, renewals, replacements, alterations, additions, betterments, and improvements thereto and thereon as to it may seem judicious, and in such case the trustee shall have the right to manage the mortgaged premises and carry on the business and exercise all the rights and powers of the mortgagor, either in the name of the mortgagor or otherwise, as the trustee shall deem best, and it shall be entitled to collect and receive all tolls, earnings, incomes, rents, issues, and profits of the same, and every part thereof, and, after deducting the expenses of operating said plants, and other property, and of conducting the business thereof, and of all repairs, maintenance, renewals, replacements, alterations, additions, betterments, and improvements, and all payments which may be made for taxes, assessments, and insurance, or prior or other proper charges upon said premises and property, or any part thereof, as well as just and reasonable compensation for its own services, and for all agents, clerks, servants, and other employes by it properly engaged and employed, it shall employ the moneys arising as aforesaid, as follows: In case the principal of the bonds hereby secured shall not have become due by declaration or otherwise, to the payment of the interest in default in the order of maturity, with interest thereon at five per cent., such payments to be made ratably to the persons entitled thereto without discrimination or preference. In case the principal of the bonds hereby secured shall have become due by declaration or otherwise, first, to the payment of the principal and accrued interest in the manner provided in this indenture. Upon the payment in full of whatever may be due for the principal and interest of the said bonds, or be payable for other purposes, the premises shall be returned to the mortgagor; and, for the purposes aforesaid, said mortgagor hereby covenants that it will, on demand, surrender and deliver to said trustee, or its duly appointed agent, actual and complete possession of all said property, rights, and franchises, and all its books, records, papers, accounts, and moneys, and all the management and control thereof.

(b) May, in the name of the mortgagor and as its attorney in fact for that purpose by these presents duly constituted, sell to the highest and best bidder all and singular the real estate, plants, factories, patents, good will, rights, privileges, goods, and chattels, and

all other property held by or conveyed to it under this indenture, or intended so to be, and all right, title, interest, claim, and demand therein, and the right of redemption thereof, in one lot and as an entirety, or in separate lots, as the trustee shall deem best, and in one sale, or any number of separate sales, held at one time or any number of times, which said sale or sales shall be made at public auction at such place in the city of ....., and at such time and upon such terms, as the trustee may fix and briefly specify in the notice of sale to be given as herein provided, or as may be required by law. If the trustee shall determine to sell said mortgaged property in parcels, it may, in its discretion, make the sale of any one of the plants and properties hereinabove described at any place where said plant and property may be located; and upon receiving the purchase money for the same, but not before, said trustee shall execute, acknowledge, and deliver to the purchaser or purchasers at such sale or sales, his or their heirs, personal representatives, successors, and assigns, good and sufficient deeds or other conveyances of the property so sold, according to its nature, and shall do or cause to be done all acts or things that may be necessary to transfer and convey to him or them, or any of them, the property or franchises, so as aforesaid sold to him or them, which said sale or sales and conveyance or conveyances shall be forever a bar both at law and in equity against said mortgagor, its successors or assigns, and all persons or bodies corporate claiming by, from, through, or under it or them. The receipt of said trustee, given to any such purchaser or purchasers for the purchase price of any such property, rights, or franchises, so as aforesaid sold to him or them, shall be sufficient acquittance to him or them for the same, and legal and sufficient evidence of the payment of such purchase price, to bind and conclude the parties hereto, and the holder or holders of any of said bonds, and all persons or bodies corporate claiming by, through, or under them, or any of them.

Seventeenth. The trustee, from time to time, may adjourn any sale or sales by it to be made under the provisions of this indenture by announcement at the time and place appointed for such sale, or for such adjourned sale or sales; and, without further notice or publication, it may make such sale or sales at the time and place to which the same shall be so adjourned.

Eighteenth. The trustee may proceed to protect and enforce its rights, and the rights of the bondholders under this indenture, by a suit or suits in equity or at law, whether for the specific performance of any covenant or agreement contained herein or in aid of the execution of any power herein granted, or for any foreclosure here-

under, or for the enforcement of any other appropriate legal or equitable remedy, as the trustee, being advised by counsel learned in the law, shall deem most effectual to protect and enforce the rights aforesaid.

Nineteenth. In case the trustee shall have proceeded to enforce any right under this indenture by foreclosure, entry, or otherwise, and such proceedings shall have been discontinued or abandoned because of any waiver, or for any other reason, or shall have been determined adversely to the trustee, then and in every such case the company and the trustee shall be restored to their former position and rights hereunder in respect of the mortgaged property, and all rights, remedies, and powers of the trustee shall continue as though no such proceeding had been taken.

Twentieth. Said trustee is hereby authorized and empowered to take any other different proceeding, in any manner permitted by law, or in any court having jurisdiction in the premises, to enforce in all respects the trust hereby created, or to sell the property, rights, and franchises hereby conveyed or intended to be conveyed, or to foreclose forever all the estate, benefit, and equity of redemption of said mortgagor, its successors and assigns, in and to the same; and nothing herein contained shall be so construed as to take away or to limit in any respect the right of said trustee, upon the events and contingencies hereinbefore set forth, to apply to any court of competent jurisdiction for the appointment of a receiver to take charge of and manage said property, rights, and franchises, or for the passage of a decree of foreclosure and sale of the same, or for any other relief necessary for the security and protection of the holders of the bonds so as aforesaid authorized to be issued. And upon the filing of a bill in equity or the commencement of other judicial proceedings for the enforcement of the lien of these presents, after default in the performance of any of the covenants and conditions of these presents has occurred and continued as aforesaid, the trustee shall be entitled, as a matter of right, to the appointment of a receiver or receivers of the property, rights, and franchises hereby conveyed or intended to be conveyed, and of the rents, issues, and profits thereof; and, except as in these presents otherwise expressly provided, no right or remedy conferred upon or reserved to said trustee or the holders of any of said bonds is intended to be exclusive of any other right or remedy, but each and every such right or remedy is intended to be cumulative and in addition to any and every other right or remedy given by these presents or provided by law.

Twenty-first. Anything in this indenture contained to the contrary notwithstanding, the holders of a majority in amount of the bonds hereby secured and then outstanding, from time to time, shall have the right to direct and to control (subject to the limitations above described) the method and place of conducting any and all proceedings for any sale of the property hereby pledged, or for the foreclosure of this indenture, or for the appointment of a receiver, or for the purpose of taking any other proceedings hereunder.

Twenty-second. Any request, direction, or other instrument required by this indenture to be signed and executed by bondholders may be any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by agent appointed in writing. Proof of the execution of any such request, direction, or other instrument, or of the writing appointing any such agent, and of the ownership of bonds, if made in the following manner, shall be sufficient for any purpose of this indenture, and shall be conclusive in favor of the trustee with regard to due action by it taken under such request:

Twenty-third. The fact and date of the execution by any person of any such writing may be proved by the certificate of any officer in any jurisdiction, who, by the laws thereof, has power to take acknowledgments within said jurisdiction, to the effect that the person signing such writing acknowledged before him the execution thereof or by an affidavit of a witness of such execution.

Twenty-fourth. The fact of the holding of bonds hereunder by any bondholder, and the amount and issue number of any such bonds, and the date of his holding the same, may be proved by a certificate executed by any trust company, bank, banker, or other depository (wherever situated), if such certificate shall be deemed by the trustee to be satisfactory, showing that at the date therein mentioned such persons had on deposit with such trust company, bank, banker, or other depository the bonds described in such certificate.

Twenty-fifth. In case of any sale hereunder, any purchaser, for the purpose of making settlement or payment for the property purchased, shall be entitled to use and apply any bonds, by presenting such bonds, in order that there may be credited thereon the sums applicable to the payment thereof out of the net proceeds of such sale to the owner of such bonds as his ratable share of such net proceeds, after making any deductions which may be made from the proceeds of sale for costs, expenses, compensation, and other charges, and thereupon such purchaser shall be credited, on account of such purchase price payable by him, with the sums applicable to

of such net proceeds to the payment of and credited on the bonds so presented; and, at any such sale, any bondholders may bid for and may purchase such property, and may make payment therefor as aforesaid, and, upon compliance with the terms of sale, may hold, retain, and possess and dispose of such property in their own absolute right, without further accountability.

Twenty-sixth. And in case of any such sale or sales, or of any sale of the property, rights, and franchises, hereby conveyed or intended to be conveyed, in pursuance of the terms of these presents, or in execution of the trust hereby created, or in the course of the foreclosure of these presents, the proceeds of such sale or sales, together with any income arising from the same in the hands of said trustee, or of any receiver or other officer of the court, shall be applied as follows; that is to say:

1. To the payment of all costs and expenses pertaining to such sale or sales, and all counsel fees and other expenses, incurred in that behalf, or in or about the performance of any other duty hereunder, and all disbursements or expenses made or incurred by said trustee in and about the care and management of said property, rights, and franchises, including a reasonable compensation for the services of said trustee, its agents or attorneys, in the premises.

2. To the payment of the whole amount of principal and accrued interest, and interest upon overdue interest, of said bonds, or so many thereof as shall be then outstanding and unpaid, whether said principal shall have matured or not; but in case the proceeds of any such sale or sales shall not be sufficient in amount to pay in full the principal and interest of all of said bonds as aforesaid, then the same shall be applied to the payment of said bonds ratably and proportionately, the principal of such bonds and the accrued interest thereon, as aforesaid, to share and participate in like manner in such distribution.

3. Any surplus remaining after the payment in full of all said bonds and coupons and interest as aforesaid shall be paid over to said mortgagor, its successors or assigns.

Twenty-seventh. No right of action for the enforcement of these presents, or for the enforcement of any one or more of said bonds intended to be secured hereby, shall be vested in the holder or holders of said bonds; and the exclusive right of action hereunder, and for the enforcement of said bonds, shall be vested in said trustee, except as herein otherwise expressly provided; nor shall said trustee be obliged so to act, or to take any steps for the enforcement of any covenant or agreement contained herein, until after demand shall have been made upon said trustee by the holders of a majority of said bonds, as herein provided, accompanied by a tender of indem-

nity satisfactory to said trustee. But in case said trustee shall, after such demand made as aforesaid and accompanied by such tender of indemnity, refuse to take action in accordance with such demand, then, and in that event, the holders of a majority of said bonds may proceed to have and take such action on their own behalf and in their own name. All such proceedings, however, had hereunder, whether instituted or taken by said trustee or otherwise, shall be taken, instituted, and maintained for the equal benefit and security of the holders of all the outstanding bonds intended to be secured hereby.

Twenty-eighth. No action at law shall be instituted against the mortgagor by any bondholder to enforce the contractual liability of the mortgagor, by reason of its covenants and promises contained in said bonds, until the property hereby mortgaged shall have been exhausted by pursuit of the remedies herein provided.

Twenty-ninth. No delay or omission of the trustee, or of any holders of bonds hereby secured, to exercise any right or power accruing upon any default continuing as aforesaid, shall impair any such right or power, or shall be construed to be a waiver of any such default or acquiescence therein; and every power and remedy given by this article to the trustee or to the bondholders may be exercised from time to time, and as often as may be deemed expedient by the trustee or by the bondholders.

Thirtieth. No recourse under or upon any obligation, covenant, or agreement contained in this indenture, or in any bond hereby secured, or because of the creation of any indebtedness hereby secured, shall be had against any incorporator, stockholder, officer, or director of the mortgagor, or of any successor corporation, either directly or through the mortgagor, by the enforcement of any assessment, or by any legal or equitable proceeding by virtue of any statute or otherwise; it being especially agreed and understood that this mortgage, and the obligations hereby secured, are solely corporate obligations, and that no personal liability whatever shall attach to, or be incurred by, incorporators, stockholders, officers, or directors of the mortgagor, or of any successor corporation, or any of them, because of the incurring of the indebtedness hereby authorized, or under or by reason of any of the obligations, covenants, or agreements contained in this indenture, or in any of the bonds or coupons hereby secured, or implied therefrom, and that any and all personal liabilities of every name and nature, and any and all rights and claims against every such incorporator, stockholder, officer, or director, whether arising at common law or in equity, or created by statute or constitution, are hereby expressly released and waived as a condition of and as a part of the consideration for the

execution of this indenture, and of the issuing of the bonds and interest obligations secured hereby.

Thirty-first. If, when the bonds hereby secured shall have become due and payable, the mortgagor shall well and truly pay, or cause to be paid, the whole amount of the principal moneys and interest due upon all the bonds hereby secured, then outstanding, or shall provide for such payment by depositing with the trustee hereunder for the payment of such bonds the entire amount then due thereon for principal and interest, and also shall pay or cause to be paid all sums whatever payable hereunder by the mortgagor, and shall well and truly keep and perform all the things herein required to be kept and performed by it, according to the true intent and meaning of this indenture, then and in that case all the property, rights, and interests hereby conveyed or pledged shall revert to the mortgagor, and the estate, right, title, and interest of the trustee shall thereupon cease, determine and become void; and the trustee in such case, upon demand of the mortgagor, and at its cost and expense, shall execute proper instruments acknowledging satisfaction of this indenture, and such deeds of release or conveyance as shall be necessary, proper, or requisite to revert in the mortgagor the property then subject to this indenture, free and discharged from the lien thereof.

Thirty-second. Said trustee hereby accepts the trusts, and assumes the duties, hereby created, upon, and only upon, the following conditions:

Thirty-third. The recital of facts herein and in said bonds contained shall be taken as statements by the mortgagor and shall not be construed as made by the trustee.

Thirty-fourth. It shall be no part of the duty of said trustee to record or file these presents as a mortgage of real or personal property; nor shall it be any part of the duty of said trustee to effect or cause to be effected, insurance against fire or other damage to any portion of the property hereby mortgaged, or to renew any policies of fire or other insurance, or to keep itself informed or advised concerning the payment of rents, taxes, or assessments of or upon the mortgaged premises and property, or to require the payment of such rents, taxes, or assessments. Said trustee may, however, in its discretion, and at the expense of said mortgagor, do any or all of the matters and things in this paragraph set forth, or procure the same to be done; and in case said trustee shall make any outlay or incur any expense in order to do or cause to be done any one or more of said acts, matters, or things, then it shall be entitled to, and shall have, a lien, until repaid, upon the property, rights, and franchises hereby conveyed, for the amount of such outlay or expense, prior to the lien and incumbrance of any of the bonds in-

tended to be secured hereby. But said mortgagor hereby covenants to repay and reimburse to said trustee the full amount of any of such outlay or expense.

Thirty-fifth. Said trustee may select and employ, in and about the trusts and duties herein set forth, suitable agents and attorneys whose reasonable compensation shall be paid by the mortgagor, or, in default of such payment, shall be charged upon the hereby mortgaged property and its proceeds, paramount to the lien of said bonds; and said trustee shall not be liable for any neglect, omission, or wrongdoing of any such agents or attorneys, provided reasonable care shall have been exercised by said trustee in their selection; nor shall it be otherwise answerable, save for its own willful negligence and default in the premises.

Thirty-sixth. In case said trustee shall incur any expense or liability hereunder, or in the performance of any duty or power hereby conferred upon it, said trustee shall be entitled to claim compensation and reimbursement for the same from said mortgagor; and it shall have a lien, prior and paramount to the lien of the bonds, so as aforesaid authorized to be issued, upon the hereby mortgaged property, rights, and franchises, for the amount of such outlay, expense, or liability, and also for its compensation, reasonable expenses, and counsel fees, incurred in the performance of the trust, powers, and duties herein set forth, or any of them, all of which, however, said mortgagor agrees to pay; and the holder of each bond issued hereunder assents to such priority of lien.

Thirty-seventh. The trustee shall be under no obligation or duty to perform any act hereunder, or defend any suit in respect hereof, unless requested so to do by holders of a majority of the bonds secured hereby and reasonably indemnified. Excepting as herein expressly otherwise provided, the trustee shall not be bound to recognize any person as a bondholder, unless and until his bonds are submitted to the trustee for inspection, if required, and his title satisfactorily established, if disputed.

Thirty-eighth. The mortgagor agrees, from time to time, on demand, to pay to the trustee reasonable compensation for its services hereunder; also to indemnify and save the trustee harmless against any and all liabilities of any kind which the trustee may incur in the exercise and performance of its powers and duties hereunder; and for such indemnification, reimbursement, and payment of trustee's compensation a first lien is hereby imposed in favor of the trustee upon all the property and funds hereby conveyed in trust.

Thirty-ninth. Said trustee shall have the right, at any time, to require and obtain from said mortgagor any information in regard to the property, affairs, condition, and conduct of said mortgagor, which it, said trustee, shall desire, and said mortgagor hereby cove-

nants to furnish the same truthfully, accurately, and promptly to said trustee; and a certificate of such information, under the corporate seal of said mortgagor, signed by its president, and verified by the affidavit of one or more of its directors, shall be sufficient evidence of the facts therein stated to protect said trustee; but the giving of such certificate by said mortgagor shall not preclude or prevent said trustee from making any other investigation that it may deem expedient and proper in the premises.

Fortieth. And it is further covenanted and agreed that the trustee may resign and discharge itself of the trust hereby created by notice in writing to the mortgagor, to be given at least three months before such resignation is to become effective.

Forty-first. The trustee, or any trustee hereafter appointed, may be removed at any time by an instrument or concurrent instruments in writing, signed by the holders of not less than two-thirds in amount of the bonds hereby secured and then outstanding, and signed also by the mortgagor. In case at any time the trustee, or any trustee hereafter appointed, shall resign, or shall be removed, or otherwise shall become incapable of acting, a successor may be appointed by the holders of two-thirds in amount of the bonds hereby secured then outstanding, by an instrument, or concurrent instruments, signed by such bondholders or their attorneys in fact, duly authorized; provided, nevertheless, and it is hereby agreed and declared that, in case at any time there shall be a vacancy in the office of trustee hereunder, the mortgagor, by an instrument executed by order of its board of directors, may appoint a trustee to fill such vacancy until a new trustee shall be appointed by the bondholders as herein authorized. The mortgagor shall publish notice of such appointment by it made once in each week for four successive weeks in a daily paper published in the city of ..... and any trustee so appointed by the company shall immediately, and without further act, be superseded by a trustee appointed by the bondholders, in the manner above provided, prior to the expiration of one year after such publication of notice. Every such trustee appointed by the bondholders or by the company shall always be a trust company in good standing, if there be such a trust company willing and able to accept the trust, upon reasonable or customary terms.

Forty-second. Any new trustee appointed hereunder shall execute, acknowledge, and deliver to the trustee last in office, and also to the company, an instrument accepting such appointment hereunder, and thereupon such trustee, without any further act, deed, or conveyance, shall become vested with all the estates, properties, rights, powers, trusts, duties, and obligations of its predecessor in trust hereunder, with like effect as if originally named as trustee herein; but the trustee ceasing to act shall, nevertheless, on the written

request of the mortgagor, or of the new trustee, execute and deliver an instrument transferring to such new trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts of the trustee so ceasing to act, and shall duly assign, transfer, and deliver all properties and moneys held by such trustee to the new trustee. Should any deed, conveyance, or instrument in writing from the mortgagor be required by any new trustee for more fully and certainly vesting in and confirming to such new trustee such estate, rights, powers, and duties, any and all such deeds, conveyances, and instruments in writing shall, upon request, be made, executed, acknowledged, and delivered by it.

Forty-third. All the covenants, stipulations, promises, undertakings, and agreements herein contained by or on behalf of either party hereto shall bind its successors and assigns, whether so expressed or not.

And this indenture further witnesseth, that the said X. Y. Z. Company, Incorporated, by these presents doth appoint and constitute ..... its due and lawful attorney, for it and in its name, to acknowledge these presents to be its act and deed, as herein set forth, to the end that the same may be recorded according to the laws of the District of Columbia, or of any state or territory or foreign country, in such cases made and provided; and the said National Trust Company of the District of Columbia doth hereby constitute and appoint ..... its due and lawful attorney, for it and in its name, to acknowledge these presents to be its act and deed, as herein set forth, to the end that the same may be so recorded.

In testimony whereof, the parties hereto have caused these presents to be signed in their corporate names by their respective presidents, and their corporate seals to be hereunto affixed, attested by their respective secretaries, on the day and year first hereinabove mentioned.

[Corporate Seal.] X. Y. Z. Company, Incorporated,

By ....., President.

Attest: ....., Secretary.

[Corporate Seal]. National Trust Company of the District of Columbia,

By ....., President.

Attest: ....., Secretary.

United States of America, }  
..... } to wit:

I, ....., a notary public in and for the said ....., do hereby certify that ..... the attorney of the X. Y. Z. Company, Incorporated, and ..... the attorney of the National Trust Company of the District of Co-

lumbia, who are named as the attorneys of said companies respectively in the foregoing instrument in writing bearing date on the ..... day of ....., 19.., and hereunto annexed, by virtue of and in pursuance of the power and authority thereby conferred upon them respectively, personally appeared before me in the said ....., the said ..... and ..... being personally well known to me as the persons named in said instrument as aforesaid, and did acknowledge the foregoing instrument in writing to be the act and deed of the X. Y. Z. Company, Incorporated, and the National Trust Company of the District of Columbia respectively, as and for the purposes therein set forth.

Given under my hand and official seal this ..... day of ....., A. D. 19...

....., Notary Public.

## CHAPTER XXIII

## VOTING TRUSTS

## § 478. General Plan.

## Legality.

- |      |     |                       |
|------|-----|-----------------------|
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## § 478. General Plan—Legality.

These arrangements may assume several forms. The usual method of effecting a voting trust at present is for all or a certain number of the stockholders to transfer their stock, or a portion of it, into the hands of trustees, who have the transfer registered on the books of the company, and surrender the certificates so assigned to them, taking in return a new certificate of stock in their own names as trustees; filing at the same time, as evidence of the terms of their trust, a copy of the

pooling agreement. These trustees then issue to each of the persons in the pool a certificate reciting that each owner is entitled to an interest in the corporation proportioned to the number of shares originally deposited by him or his assignor, and, upon the receipt of dividends upon the trust stock held by them, the trustees will pay over to each certificate holder an amount equal to the dividend which would have come to him, had he retained his original certificate of stock—less, of course, his proportion of the expenses incident to carrying out the pooling agreement. By the arrangement between the original stockholders and the trustees, these pool certificates are transferable to the same extent as a certificate of stock would be; but the transfer does not carry with it the voting power, which is lodged permanently during the life of the trust in the trustees themselves. The voting power is thus separated from the beneficial ownership or the interest in the corporation. The scheme is useful to enable certain persons to control the policy of the corporation.<sup>1</sup>

§ 479. The validity of these agreements has frequently been under discussion in the courts. Little was known of such combinations thirty years ago, but during the last fifteen years they have become quite common. The decisions are in conflict, and it is difficult to lay down any rule which may safely be followed. Mr. Cook, in his work on Corporations, after a careful review of the authorities, comes to the conclusion "that a deposit of certificates of stock with trustees for a specified period of time, either with or without a transfer of the same to the trustees, is legal, and is not in violation of the usual statute against restraints on the alienation of personal property, and is not opposed to public policy, as a restraint upon trade, and is not an implied fraud upon stockholders who are not allowed to participate, and is not an illegal separation of the voting power from the ownership of the stock, provided,

<sup>1</sup> See *Morel v. Hoge*, 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935.

always, that no actual fraud is involved in the transaction. In other words, such a pooling of stock is not illegal in itself, but, like all contracts, may be illegal if actual fraud is involved.”<sup>2</sup> This is probably the correct conclusion to be drawn from a thoughtful study of the cases.

§ 480. Below will be found a tabulated statement of the result of the decisions in those states whose courts have acted upon this subject of voting trusts.

### § 481. Alabama.

In the year 1887 the Supreme Court of Alabama<sup>3</sup> held that there was nothing *per se* illegal in an agreement entered into between certain stockholders by which they promised to vote together as a unit in all matters pertaining to the government of a corporation; but whether such an agreement, to exist for a definite length of time, would be valid, was not decided. The court said, however, that it would not be lawful for the stockholders to place their stock in the hands of trustees, with a proviso that any stockholder could sell his financial interest in the corporation, exclusive of the voting power, provided he should first give the refusal to purchase to other parties to the agreement at the price which he could obtain from a dissatisfied party. About five years later the same court held that an agreement entered into between stockholders of a railroad in the hands of a receiver for the purpose of reorganization, by which the stockholders placed their stock in the hands of trustees to vote, would be upheld; the court apparently considering that no general rule could be laid down for all cases, but that regard should be had to the condition of the parties, the purposes to be accomplished, the consideration for the undertaking, interests which have been surrendered, rights acquired, and the consequences to result.<sup>4</sup>

<sup>2</sup> 2 Cook, Corp. bottom pp. 1369-1371.

<sup>3</sup> Moses v. Scott (1887) 84 Ala. 608, 4 South. 742.

<sup>4</sup> Mobile & O. R. Co. v. Nicholas (1892) 98 Ala. 92, 12 South. 723.

§ 482. **California.**

In 1897, it was held that an agreement between several stockholders to vote their stock as a unit for a period of five years in the election of directors was valid.<sup>5</sup> A couple of years later the Supreme Court sustained a contract by which one stockholder agreed, in order that he should not control a majority of the stock, to transfer his stock to another party, with a proxy irrevocable to vote the stock for the benefit of the corporation for five years.<sup>6</sup>

§ 483. **Connecticut.**

In this state voting trusts have been squarely condemned. In the case cited in the note <sup>7</sup> shares of stock were placed in the Mercantile Trust Company, which had no beneficial interest in the stock, to be held by it as trustee to vote the same for a term of five years. The stockholders were permitted to sell the trust certificates, but not the right to vote. The statute of the state prohibited voting any stock by virtue of a power of attorney not executed within one year next preceding the meeting at which the stock was sought to be voted. The court held that the voting power could not be separated from the beneficial ownership, and that in any event the term of the trust exceeded by four years anything that the public policy of the state countenanced.

§ 484. **District of Columbia.**

No decision is found in this District passing upon the validity of voting trusts. It appears to have been assumed by the Court of Appeals and the Supreme Court of the United

<sup>5</sup> *Smith v. San Francisco & N. P. Ry. Co.* (1897) 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L. R. A. 309.

<sup>6</sup> *Whitehead v. Sweet* (1899) 126 Cal. 67, 58 Pac. 376.

<sup>7</sup> *Shepaug Voting Trust Cases* (1890) 60 Conn. 576, 24 Atl. 32.

Staes, no question as to validity being raised in the case, that such a trust was legal.<sup>8</sup>

§ 485. **Georgia.**

Voting trusts are held illegal in Georgia.<sup>9</sup>

§ 486. **Idaho.**

In Idaho it is legitimate for several stockholders to combine their holdings for the purpose of the election of officers and controlling the management of a corporation.<sup>10</sup>

§ 487. **Illinois.**

Pooling agreements are sanctioned by the Illinois courts, at least as long as the original parties retain their interests and no other rights intervene.<sup>11</sup>

§ 488. **Kentucky.**

Voting trusts are approved in Kentucky.<sup>12</sup>

§ 489. **Maine.**

Such trusts are held valid in the state of Maine.<sup>13</sup>

<sup>8</sup> Moore Printing & Typewriter Co. v. Nat. Savings & Trust Co. (1910) 218 U. S. 422; Id., 31 App. D. C. 452.

<sup>9</sup> Clarke v. Central Railroad & Banking Co. of Georgia (C. C. 1892) 50 Fed. 338, 15 L. R. A. 683; Morel v. Hoge (1908) 130 Ga. 625, 61 S. E. 487, 16 L. R. A. (N. S.) 1136, 14 Ann. Cas. 935.

<sup>10</sup> Weber v. Della Mountain Mining Co. (1908) 14 Idaho, 404, 94 Pac. 441.

<sup>11</sup> Ziegler v. Lake Street Elevated R. Co. (C. C. 1895) 69 Fed. 176; Faulds v. Yates (1870) 57 Ill. 416, 11 Am. Rep. 24; Gray v. Bloomington & N. R. Co. (1905) 120 Ill. App. 159.

<sup>12</sup> Ecker v. Kentucky Refining Co. (1911) 144 Ky. 264, 138 S. W. 264.

<sup>13</sup> Hall v. Merrill Trust Co. (1910) 106 Me. 465, 76 Atl. 926, 138 Am. St. Rep. 355.

§ 490. **Maryland.**

The recent Maryland corporation statute of 1908 gives legislative sanction to voting trusts.<sup>14</sup>

§ 491. **Massachusetts.**

Pooling agreements are upheld in Massachusetts.<sup>15</sup>

§ 492. **Mississippi.**

Voting trusts are forbidden by statute.<sup>16</sup>

§ 493. **New Hampshire.**

The validity of voting trusts has been recognized.<sup>17</sup>

§ 494. **New Jersey.**

As might be expected, owing to the number of corporations created under the laws of the state of New Jersey, the subject of voting trusts has received greater consideration by its courts than by the courts of any other state. In the first case on this subject which came before the New Jersey courts,<sup>18</sup> the court held void a contract by which several holders of stock, some belonging to a decedent's estate, agreed to give an irrevocable power of attorney to a partnership for a term of three years and a further period of five years thereafter, so as to enable this partnership to vote several persons into office for a period of five years at a stated salary. But the court expressly stated that it did not condemn all pooling or combining of stock, where the object is to carry out a particular policy with a view to promoting the best interests of all the stockholders.

<sup>14</sup> Maryland Corporation Act (Laws 1908, c. 240) § 77.

<sup>15</sup> Brightman v. Bates (1900) 175 Mass. 105, 55 N. E. 809.

<sup>16</sup> Code Miss. 1906, § 5002, as amended by Laws 1908, c. 119, § 1.

<sup>17</sup> Bowditch v. Jackson Co. (1912) 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913A, 366.

<sup>18</sup> Cone v. Russell (1891) 48 N. J. Eq. 208, 21 Atl. 847.

§ 495. Subsequently an injunction was issued restraining a trustee from voting stock under an agreement by which the pool trustee was required to vote for directors so that a minority of one in the board should consist of such persons as one Thomas should direct, and a majority of one should consist of such persons as the remaining stockholders should direct. Subsequently Thomas sold nearly all of his interest in the company. The court held that it would be against public policy for him under those circumstances to continue to direct the affairs of the company.<sup>19</sup> This doctrine was later upheld by the same court in a case, however, in which it was decided that an agreement placing stock in the name of a trustee with voting powers might be valid.<sup>20</sup>

§ 496. In the year 1900 the important case of *Kreissl v. Distilling Co. of America*<sup>21</sup> came before the Chancellor for decision. In his opinion in that case the following principles were enunciated:

§ 497. "Where the scheme devised does not embrace a grant of irrevocable powers by proxy, but seeks a similar object by the creation of a trust and the appointment of a trustee, to whom the title to the stock is conveyed, \* \* \* if no provision is made for the conduct of the trustee, at least he would be bound to vote the stock held in trust in accordance with the express wishes of the *cestui que trust*; but if the transfer of the legal title to the stock is made and accepted under an agreement of the stockholder which deprives him of all power to direct the trustee, all opportunity to exercise his own judgment in respect to the management of the affairs of the corporation, then whether the transaction is open to the objection of other stockholders, as depriving them of the right they have to the aid of their costockholders, must be de-

<sup>19</sup> *White v. Thomas Inflatable Tire Co.* (1893) 52 N. J. Eq. 178, 28 Atl. 75.

<sup>20</sup> *Clowes v. Miller* (1900) 60 N. J. Eq. 179, 47 Atl. 345.

<sup>21</sup> 61 N. J. Eq. 5, 47 Atl. 471.

pendent upon the purposes for which the trust was created, and the powers that were conferred. If stockholders, upon consideration, determine and judge that a certain plan for conducting and managing the affairs of the corporation is judicious and advisable, I have no doubt that they may, by power of attorney, or the creation of a trust, or conveyance to a trustee of their stock, so combine or pool their stock as to provide for the carrying out of the plan so determined upon. If stockholders combine by either mode to intrust and confide to others the formulation and execution of a plan for the management of the affairs of the corporation, and exclude themselves, by acts made and attempted to be made irrevocable for a fixed period, from the exercise of judgment thereon, or if they reserve to themselves any benefit to be derived from such a plan to the exclusion of other stockholders who do not come into the combination, then in my judgment such combination, and the acts taken to effect it, are contrary to public policy, and other stockholders have a right to the interposition of a court of equity to prevent its being put into operation." The agreement under consideration in that case was condemned, because it did not allow the parties beneficially interested in the company to control its policy, and excluded stockholders who did not sign the agreement from any benefits under it.

§ 498. Later in the same year the Court of Errors and Appeals sustained a pooling agreement open to none of the objections indicated above.<sup>22</sup>

§ 499. In 1903 the Court of Errors and Appeals gave very elaborate consideration to this whole subject.<sup>23</sup> The voting trust of the Fisheries Company, claimed by a British corporation, was dissolved because: (1) No other than a New Jersey corporation having the beneficial ownership of the stock could become a stockholder in another New Jersey corpora-

<sup>22</sup> *Chapman v. Bates* (1900) 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459.

<sup>23</sup> *Warren v. Pim* (1904) 66 N. J. Eq. 353, 59 Atl. 773.

tion; (2) the holders of all shares did not have equal privilege of availing themselves of the trust agreement; and (3) the object of the trust was to benefit part of the stockholders at the expense of others.

§ 500. In a case decided in 1911,<sup>24</sup> the Vice Chancellor stated that it was not lawful and a gross violation of the public policy of New Jersey to permit a contract for a separation of the voting power of corporate stock from its ownership. It does not appear, however, that he attempted to overrule any of the utterances made by the same court in the cases to which allusion has been made above.<sup>25</sup> It may be that the anti-trust law passed by the New Jersey Legislature in 1913 (chapter 13) has now definitely fixed by legislation the public policy of the state as being opposed to voting trusts. This act has not yet been construed by the courts.

#### § 501. New York.

In the state of New York the validity of voting trusts has been the subject of frequent decision. As early as 1878 the Superior Court of the state of New York decided that a contract made by the Havemeyers and their friends, the object of which was the sale of stock, and meanwhile to combine the stock and not sell except as a block, was legal.<sup>26</sup> In 1885 an agreement by which the parties contracted not to sell their stock without the concurrent consent of all the others, and which provided that neither would vote by proxy in the choice of directors, was held illegal.<sup>27</sup> The court distinguished this case from the Havemeyer case,<sup>28</sup> in which the parties agreed to act together in the choice of directors and that none of the

<sup>24</sup> *Bache v. Central Leather Co.* (1911) 78 N. J. Eq. 484, 81 Atl. 571.

<sup>25</sup> See §§ 494-499.

<sup>26</sup> *Havemeyer v. Havemeyer* (1878) 43 N. Y. Super. Ct. 506, affirmed 86 N. Y. 618.

<sup>27</sup> *Fisher v. Bush* (1885) 35 Hun (N. Y.) 641.

associates should sell any of their shares, and, if he did, that all should share in the profits derived therefrom. In 1895 an agreement was sustained<sup>28</sup> by which the parties thereto for a valid consideration gave a proxy for 10 years to vote stock. The arrangement appeared to be for the benefit of all the stockholders. In 1896 the Court of Appeals upheld an agreement in writing between the promoters of a corporate enterprise, owning <sup>99</sup>/<sub>100</sub> of its stock, to partition their holdings after first placing in the treasury one-fifth of all the stock, to be sold to provide a working capital, and in order to prevent a sacrifice thereof, providing for the deposit of their individual certificates with a trust company, not to be withdrawn for six months without mutual consent.<sup>29</sup> In none of these cases was the modern voting trust really considered.

§ 502. The federal courts in the state of New York have, however, considered what is very closely akin to such a pooling arrangement. As far back as 1867 certain stockholders of the Pacific Mail Steamship Company vested their holdings in trustees, with an irrevocable power to vote for them for a term of years, with the understanding that the parties to the compact were not to sell their stock without having first offered to sell it to the rest of their associates at a price not above the then current market value, and, in case of their declining to take it, then to the trustees, but with leave to any one of the parties to withdraw at any time on those terms. The agreement was upheld.<sup>30</sup>

§ 503. The United States Circuit Court for the Southern District of New York some twenty years later had before it for consideration an arrangement by which stockholders had deposited stock with Drexel, Morgan & Co., with power to transfer the same and issue negotiable receipts for it, such

<sup>28</sup> *Hey v. Dolphin* (1895) 92 Hun, 230, 36 N. Y. Supp. 627.

<sup>29</sup> *Williams v. Montgomery* (1896) 148 N. Y. 519, 43 N. E. 57.

<sup>30</sup> *Brown v. Pacific Mail Steamship Co. et al* (1867) 5 Blatchf. 525, Fed. Cas. No. 2,025.

deposits to be made for the purpose of enabling the board of directors to dispose of the property and effects of the company in any way they might deem best or to dispose of all the stock deposited for the equal benefit of all such stock, at a price not less than par, or to execute a lease of the railroad and property on a basis to yield not less than 4 per cent. dividends to the stock, and to vote for such directors as they might deem desirable. The court held that a party who was dissatisfied with the arrangement might withdraw his stock before any action had been taken by the trustees under the agreement.<sup>31</sup>

§ 504. Whatever doubt might be felt as to the attitude of the New York courts upon the subject of voting trusts is now dispelled by the New York incorporation law of 1901, which expressly sanctions agreements of this kind.<sup>32</sup>

#### § 505. North Carolina.

In North Carolina voting trusts are held to be invalid on the broad ground that it is incompetent to separate the beneficial ownership in stock from the voting power.<sup>33</sup>

#### § 506. Ohio.

The courts in Ohio have declined to recognize as valid pooling agreements in which the legal title to stock was placed in the hands of trustees, with discretionary power to vote without regard to the wishes of those beneficially interested in the stock.<sup>34</sup> The Standard Oil trust was declared void, un-

<sup>31</sup> *Woodruff v. Dubuque & S. C. R. Co.* (C. C. 1887) 30 Fed. 91.

<sup>32</sup> General Corporation Law (Laws 1901, c. 355, amending Hydecker's Gen. Laws, c. 35) §§ 20, 22, and sections 21, 23-25.

<sup>33</sup> *Harvey v. Linville Implement Co.* (1896) 118 N. C. 693, 24 S. E. 489, 54 Am. St. Rep. 749, 32 L. R. A. 265; *Bridgers v. Staton et al.* (1909) 150 N. C. 216, 63 S. E. 892; *Sheppard v. Rockingham Power Co.* (1909) 150 N. C. 776, 64 S. E. 894.

<sup>34</sup> *Hafer v. New York, L. E. & W. R. R. Co.* (1885) 14 Wkly. Law

der which the majority of the stockholders of several corporations placed their stock in the hands of trustees, receiving back trust certificates, the trustees to elect at will the directors of the several companies and thereby be enabled to control the business of all of them.<sup>35</sup> The same year the Supreme Court of that state sustained an arrangement by which several stockholders placed their stock in the hands of a depository with direction to vote it as instructed by a committee appointed by themselves and subject to their control. The court adverted to the fact that the ownership and the voting power were not separated, and that the agreement then under consideration did not constitute a voting trust.<sup>36</sup>

### § 507. Pennsylvania.

Notwithstanding some decisions of the *nisi prius* courts in Pennsylvania,<sup>37</sup> the Supreme Court of that state has now definitely decided that a voting trust for a term of years, even though it be for a longer time than is allowed by law for a proxy, is valid, where the trust is coupled with an interest; and the court held that a trust was coupled with an interest, where the trustees were vested with the power of management of the corporate affairs, with the right to purchase the stock of any contracting party who did not desire to continue the trust relation, at double the par value of the stock, for the use and benefit of the remaining parties.<sup>38</sup> The distinction was

Bul. 68, 9 Ohio Dec. Reprint, 470; Griffith v. Jewett, 15 Wkly. Law Bul. 419, 9 Ohio Dec. Reprint, 627.

<sup>35</sup> State ex rel. v. Standard Oil Co. (1892) 49 Ohio St. 147, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145.

<sup>36</sup> Ohio & M. Ry. Co. v. State (1892) 49 Ohio St. 668, 32 N. E. 933.

<sup>37</sup> In re Lafferty's Estate, 2 Pa. Dist. R. 215; Vanderbilt v. Bennett (1887) 6 Pa. Co. Ct. R. 193, 2 Ry. & Corp. Law J. 409; Shelmerdine v. Welsh (1890) 47 Leg. Int. (Pa.) 26; Id., 20 Phila. (Pa.) 199; Ervin v. Philadelphia & Reading R. Co., 7 Ry. & Corp. Law J. 87.

<sup>38</sup> Boyer v. Nesbitt (1910) 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890.

drawn between a trust coupled with an interest and one which is not, as where, for instance, the only duty of the trustees is to vote as directed by the stockholders.<sup>39</sup>

§ 508. **Virginia.**

In Virginia voting trusts have been broadly upheld.<sup>40</sup>

§ 509. **Washington.**

Pooling agreements are valid in Washington.<sup>41</sup>

§ 510. **Résumé of Decisions.**

It will be observed, from a study of the cases cited in the notes to the foregoing paragraphs, that aside from a very few states, which still hold to the doctrine that it is against public policy to separate the voting power from the legal ownership of stock, most of the cases which hold voting trusts illegal have been either decided by inferior courts or are based upon certain circumstances surrounding the particular cases—as, for example, that the purpose of the parties to the trust was to accomplish an illegal object; that the agreement was without consideration, and was a mere proxy, and not coupled with an interest; that the owners of the beneficial interest could have no possible choice in the voting; that the trustees had themselves no beneficial interest, and therefore could not be expected to give their best thought to the welfare of the corporation; that it was one-sided, resulting in a special benefit to one or a few parties, giving no rights to others to come in and participate in it; or that a statute was violated. The trend of modern judicial sentiment is well expressed by the Supreme Court of Appeals of Virginia in the following language:<sup>40</sup>

<sup>39</sup> *Commonwealth v. Roydhouse* (1911) 233 Pa. 234, 82 Atl. 74.

<sup>40</sup> *Carnegie Trust Co. v. Security Life Ins. Co. of America* (1910) 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, where the voting trust in question is set forth in full.

<sup>41</sup> *Winsor v. Commonwealth Coal Co.* (1911) 63 Wash. 62, 114 Pac. 908, 33 L. R. A. (N. S.) 63.

§ 511. "In considering the cases \* \* \* and the text-writers who have commented upon them, it is impossible not to be impressed with the change of opinion which has taken place with respect to the true nature of such contracts. In the early stages of the development of this idea there was a strong sentiment against them, which found expression in the opinions of judges and in the not always temperate language of distinguished commentators upon the law; but experience has demonstrated their usefulness, and the hostility evinced towards them has by degrees diminished."

§ 512. **Points to be Guarded.**

In drafting a pooling agreement, the following points should be watchfully guarded:

A. The instrument should show that it is entered into for the benefit of the whole body of stockholders. A recital to this effect under seal would not be unwise.<sup>42</sup>

B. The pool trustees should themselves be stockholders having a beneficial interest in the corporation.<sup>43</sup> In this event

<sup>42</sup> *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L. R. A. 309; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471; *Chapman v. Bates*, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773; *Hey v. Dolphin*, 92 Hun, 230, 36 N. Y. Supp. 627; *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506; *Ohio & M. Ry. Co. v. State*, 49 Ohio St. 668, 32 N. E. 933.

<sup>43</sup> *Clarke v. Central Railroad & Banking Co. of Georgia (C. C.)* 50 Fed. 338, 15 L. R. A. 683; *Shepaug Voting Trust Cases*, 60 Conn. 553, 24 Atl. 32; *Cone v. Russell*, 48 N. J. Eq. 208, 21 Atl. 847; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773; *Knickerbocker Inv. Co. v. Voorhees*, 100 App. Div. 414, 91 N. Y. Supp. 816; *Hafer v. New York, L. E. & W. R. Co.*, 14 Wkly. Law Bul. (Ohio) 68; *Commonwealth v. Roydhouse*, 233 Pa. 234, 82 Atl. 74.

it would be well to insert a provision waiving any right to object to their voting themselves into office.

C. Provide for the substitution and appointment of new trustees. If the original trustees and the survivors are given the power of appointment and substitution, the object of the trust is best subserved.<sup>44</sup>

D. Recite some consideration, if possible, other than the mere mutual covenants, as, for example (if this be the fact), that the formation of the pool was one of the considerations leading up to the purchase of the stock.<sup>45</sup> The agreement had better be under seal.<sup>46</sup>

E. Confer upon the stockholders the right to become parties to the pool by depositing their stock.<sup>47</sup> But a close watch should be kept to see that the number of persons holding stock

<sup>44</sup> *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809; *Sullivan v. Parkes*, 74 N. Y. Supp. 787, 69 App. Div. 221; *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287.

<sup>45</sup> *Woodruff v. Dubuque & S. C. R. Co.* (C. C.) 30 Fed. 91; *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L. R. A. 309; *Brightman v. Bates*, 175 Mass. 105, 55 N. E. 809; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773; *Fisher v. Bush*, 35 Hun (N. Y.) 641; *Hey v. Dolphin*, 92 Hun, 230, 36 N. Y. Supp. 627; *Griffith v. Jewett*, 15 Wkly. Law Bul. (Ohio) 419; *Vanderbilt v. Bennett*, 6 Pa. Co. Ct. R. 193; *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287.

<sup>46</sup> *Gray v. Bloomington & N. R. Co.*, 120 Ill. App. 159; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57; *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287.

<sup>47</sup> *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471; *Chapman v. Bates*, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773; *State v. Ohio & M. R. Co.*, 6 Ohio Ct. Ct. R. 415.

in their own names is not reduced below the minimum prescribed by the statute.<sup>48</sup>

F. Where it is desired to limit the number of the stockholders in the corporation, the agreement should contain a stipulation that any certificate holder desiring to part with his interest should first offer it to the company, or to other parties to the agreement, before selling it elsewhere.<sup>49</sup>

G. The trust should be limited to a short term of years. It would be better not to have the trust continue beyond the time prescribed by statute for the life of a proxy;<sup>50</sup> and perhaps it would be safer to devise some method by which the trust might be dissolved short of the period regularly fixed upon for its termination.<sup>51</sup>

H. Provide some means, in case a substantial number of the persons beneficially interested in the stock desire it, by which the vote of the trustees may be directed, either through a meeting assembled for that purpose or by written direction without such meeting.<sup>52</sup>

<sup>48</sup> *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75.

<sup>49</sup> *Jones v. Brown*, 171 Mass. 318, 50 N. E. 648; *Boyer v. Nesbitt*, 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 874. See chapter XXI, note 2. But such an agreement is declared illegal in *Moses v. Scott*, 84 Ala. 608, 4 South. 742; *Victor G. Bloede Co. v. Bloede*, 84 Md. 129, 34 Atl. 1127, 33 L. R. A. 107, 57 Am. St. Rep. 373; *In re Klaus*, 67 Wis. 401, 29 N. W. 582.

<sup>50</sup> *Moses v. Scott*, 84 Ala. 608, 4 South. 742; *Bostwick v. Chapman*, 60 Conn. 553, 24 Atl. 32; *Chapman v. Bates*, 61 N. J. Eq. 658, 47 Atl. 638, 88 Am. St. Rep. 459; *Fisher v. Bush*, 35 Hun (N. Y.) 641; *Hey v. Dolphin*, 92 Hun, 230, 36 N. Y. Supp. 627; *Bridgers v. Staton*, 150 N. C. 216, 63 S. E. 892. But in *Boyer v. Nesbitt*, 227 Pa. 398, 76 Atl. 103, 136 Am. St. Rep. 890, a voting trust exceeding the permissible life of a proxy was sustained.

<sup>51</sup> *Kreissl v. Distilling Co. of America*, 61 N. J. Eq. 5, 47 Atl. 471; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773.

<sup>52</sup> *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025; *Moses v. Scott*, 84 Ala. 608, 4 South. 742; *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 92, 12 South. 723; *Smith v. San Fran-*

I. If deemed expedient, confer upon the trustees the right to vote for the sale of the corporate assets and franchises, should that question be presented, to dissolve the corporation, or to do any other act in the same manner as if the beneficial owners were personally voting.<sup>53</sup>

J. Provide for the issue of trust certificates and specify their form.<sup>54</sup>

K. Make such trust certificates assignable.<sup>55</sup>

### § 513. Form of Voting Trust.

The following form of voting trust has been prepared with a view to meeting the objections referred to in this chapter, and has been successfully used in practice:

#### VOTING TRUST AGREEMENT.

This agreement made this ..... day of ....., A. D. 19.., by and between the undersigned stockholders of the ..... Company, a corporation created and existing under the laws of the state of ....., hereinafter called "the subscribers," parties of the first part, and ....., of ....., ..... of ..... and ....., of ....., hereinafter called "the trustees," parties of the second part:

Whereas, it is deemed important to the interests of the subscribers to create a trust with the shareholding body as beneficiaries thereof, in order that the stock of said company shall not be liable to be bought up for speculative control, and to secure safe and pru-

cisco & N. P. Ry. Co., 115 Cal. 584, 47 Pac. 582, 56 Am. St. Rep. 119, 35 L. R. A. 309; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75; *Clowes v. Miller*, 60 N. J. Eq. 179, 47 Atl. 345; *Warren v. Pim*, 66 N. J. Eq. 353, 59 Atl. 773; *Havemeyer v. Havemeyer*, 43 N. Y. Super. Ct. 506; *Harvey v. Linville Implement Co.*, 118 N. C. 693, 24 S. E. 489, 54 Am. St. Rep. 749, 32 L. R. A. 265; *Ohio & M. Ry. Co. v. State*, 49 Ohio St. 668, 32 N. E. 933; *Vanderbilt v. Bennett*, 6 Pa. Co. Ct. R. 193.

<sup>53</sup> *Bowditch v. Jackson Co.*, 76 N. H. 351, 82 Atl. 1014, Ann. Cas. 1913A, 366; 2 Cook, Corp. § 610.

<sup>54</sup> *Carnegie Trust Co. v. Security Life Ins. Co.*, 111 Va. 1, 68 S. E. 412, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287.

<sup>55</sup> *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178, 28 Atl. 75.

dent management in the interests of the whole number of stockholders; and

Whereas, a number of the subscribers hereto have purchased the stock of said company upon the distinct agreement and understanding that this voting trust should be created:

Now, therefore, this agreement witnesseth that in consideration of the premises, and of the benefits to be derived from the mutual observance of the stipulations hereinafter contained, and for other good and valuable considerations from each to the other moving, the receipt whereof are hereby acknowledged, the parties hereto mutually agree upon the covenants hereinafter contained, this agreement, however, not to become operative until the owners of a majority of the shares into which the capital stock of said company is divided, shall in person or by attorney have signed or ratified this agreement and delivered their certificates of stock as hereinafter specified.

1. The subscribers agree to assign and transfer on the books of the company, unto the trustees and their successors in the administration of this trust, the number of shares of stock owned or held by them in said company, set opposite their respective signatures hereto, and to respectively authorize and empower the said trustees and their successors as aforesaid, as attorneys in fact for said subscribers, to cause said transfer to be made on the books of said company, subject to the trusts and conditions hereinafter declared, and for this purpose to deliver to said trustees and their successors as aforesaid the certificates evidencing the said stock now owned by them, respectively.

2. The said shares of stock so transferred shall be held by said trustees and their successors for the common benefit of all the parties to this agreement and all those who may become such as herein provided under the terms and conditions hereinafter set forth.

3. As soon as practicable after said transfer of said stock on the books of said company shall have been made, said trustees shall execute and deliver to each of the subscribers hereto, and his assigns, assignable trust certificates for the number of shares set opposite their respective names, which certificates shall be in the following form:

..... *Company.*

#### VOTING TRUST CERTIFICATE.

No. .... Shares.

This is to certify that ..... and his assigns is entitled to ..... shares, of par value of ..... (\$.....) dollars each, of the beneficial interest in the capital stock of the ..... Company, certificates for which have been issued to us, as trustees,

under and in pursuance of a certain trust agreement made between certain stockholders of said company and ourselves, as trustees, dated the ..... day of ....., A. D. 19...

The holder of this certificate is entitled to the beneficial right and interest provided in and by said trust agreement, including a proportionate share of all dividends declared and paid on the stock of said company held in trust as aforesaid, less his proportionate share of the expenses incident to this trust.

In witness whereof the said trustees have hereunto set their hands and affixed their seals on the ..... day of ....., A. D. 19...

..... [Seal.]

..... [Seal.]

..... [Seal.]

4. The interest in the stock to be assigned to the trustees as herein provided is assignable by transfer upon books to be kept for that purpose by the trustees or their successors as aforesaid, by the holder of said trust certificate or certificates in person, or by written power of attorney to that effect, accompanied by a surrender of said certificate or certificates; and a transferee, by accepting a new certificate in lieu of the one so surrendered, shall be deemed to have assented to the terms and conditions of this agreement.

5. A list of the shares of stock deposited with the trustees as herein provided, as well as a record of all trust certificates issued and transferred, shall be made and kept by said trustees and their successors, which shall contain the names and addresses of said certificate holders, and the number of shares held by each, which said record shall be open to the inspection of any certificate holder demanding the same.

6. The trust hereby created shall vest in the parties of the second part and their successors in office. In case any of the said trustees shall decline to accept or serve, or upon the resignation of any of the said trustees, or whenever any of the said trustees shall part with his beneficial interest in said company, his office shall be deemed to be vacant, and the surviving or remaining trustees shall elect his successor, who shall have and exercise hereunder the same powers and duties as were intrusted to his predecessor in office; it being distinctly understood that such successor shall always hold a beneficial interest in the stock of said company. Nothing in this agreement shall be construed to prevent any one of said trustees from becoming an individual owner of trust certificates as aforesaid, or of voting for himself as an officer or director of said company.

7. Said trustees shall have power to admit to the benefits of this trust, on an equal footing with the original parties thereto, such

stockholders in said company as may desire to become parties to this agreement.

8. The trust hereby created shall continue until the ..... day of ....., 19.., provided that the holders of a (fill in the fractional interest as desired) interest in the stock held by the trustees as herein provided may at any time terminate this trust at any meeting called for that purpose; written notice thereof having been previously mailed to each certificate holder at least ten days prior to the time fixed for such meeting. Upon the termination of said trust, the said trustees shall assign and transfer to the then holders of the trust certificates the amount of stock to which each holder thereof shall be entitled upon the surrender of his trust certificate or certificates.

9. The subscribers hereby constitute and appoint the said parties of the second part, and their successors in office, their, and each of their, true and lawful attorneys and proxies to appear for, represent, and vote for them at all meetings of the stockholders of the said company, with power to vote upon any and all questions which may arise at any such meeting or meetings, including the sale or mortgage of the entire franchise, assets, and property of the corporation, or the dissolution of such corporation, as fully and with the same effect as the said subscribers, or any of them, if personally present, could do. And if any difference of opinion should arise among said trustees or their successors as to the proper vote to be cast, then the voice of the majority of said trustees shall govern; and it shall not be necessary for said trustees to assemble together to consider any proposition, nor for all of said trustees to attend all meetings of stockholders, but the wishes of such absent trustee or trustees shall be evidenced by a writing signed by such absent trustee or trustees. And the said trustees and their successors are hereby authorized to designate some one of their number to actually cast the vote which all of said trustees, by reason of their being joint stockholders, shall be entitled to cast.

10. Should any question arise upon which any one of said trustees shall desire the action of the holders of the trust certificates, or upon which the owners of a majority in value of said trust certificates shall desire such action, a meeting for such purpose may be called by the trustees or majority owners desiring same as aforesaid, notice of which shall be given in writing by United States mail, addressed to each of said certificate holders at his last known place of residence, stating specifically the time, place, and object of the meeting; such notice to be mailed at least ..... days before the time fixed for holding said meeting. At such meeting the owners of such trust certificates may determine, by a two-thirds vote in value of the certificates so held by them, the manner in which they

desire the said trustees to vote; each certificate holder being entitled to one vote, either in person or by proxy, for each share of his beneficial interest in the capital stock of said company. The result of said vote shall be certified to the said trustees by the secretary of said meeting, and the said trustees shall cast their vote accordingly.

11. The legal title to all stock transferred under or by virtue of this agreement shall remain vested in the said trustees and their successors in trust, and they shall not sell, transfer, or assign the same during the continuance of the trust hereby created.

12. The said trustees shall receive all dividends which may be declared from time to time upon the stock held by them as aforesaid, and shall immediately pay out the same to the holders of the trust certificates as their respective interests may from time to time appear.

13. The said trustees shall be indemnified and saved harmless from any and all expenses, costs, damages, and other liability arising out of the acceptance of this trust and the issue of the trust certificates as aforesaid, each certificate holder being liable for and agreeing to contribute his proportionate share thereof; and, whenever any funds shall come into the hands of said trustees for distribution, they may deduct therefrom a sum sufficient to indemnify them as aforesaid, and divide the balance pro rata among the owners of said trust certificates.

14. In case any certificate holder shall desire to sell the beneficial interest in said company owned by him, or any part thereof, he shall, before offering the same to any one else, first notify said trustees of the number of shares thereof which he desires to sell, and said trustees shall immediately notify all of the holders of trust certificates, at their last known place of address, respectively, of such contemplated sale; and if the party desiring to sell as aforesaid shall not, within ten days after so notifying said trustees, receive an offer for said certificates satisfactory to him from one of said certificate holders, he may then, and not until then, offer said interest for sale to some one not a party to this trust agreement: provided, that such holder desiring to make sale as aforesaid shall not at any time dispose of any portion of his beneficial interest to any outside person for the same or at a less price than he shall be offered therefor by some party to this agreement.

In witness whereof the undersigned stockholders as aforesaid have hereunto subscribed their names and affixed their seals, and set opposite each signature the number of shares held or owned by them, respectively, which they desire to have held in trust as aforesaid:

and the said trustees, as an evidence of the acceptance of the trust hereby created, have also signed and sealed these presents.

Dated at the city of ..... on the ..... day of ..... , A. D. 19...

.....	[Seal.]	.....	Shares.
.....	[Seal.]	.....	Shares.
.....	[Seal.]	.....	Shares.
.....	[Seal.]	.....	Shares.

.....	[Seal.]
	Trustee.
.....	[Seal.]
	Trustee.
.....	[Seal.]
	Trustee.

## CHAPTER XXIV

## AMENDMENTS TO CHARTER

- § 514. Statute must be Followed.
- 515. Stockholders Authorize Amendment.
- 516. Notice of Meeting.
- 517. Manner of Voting.
- 518. What Amendments May be Made.
- 519. Change of Name.
- 520. Certificate of Amendment.

## § 514. Statute must be Followed.

Before the corporation has progressed very far with its business, it may discover that its charter is not properly adapted to the work in hand, and that it will be advisable to amend it in several particulars. If the charter has not been obtained by special legislative grant, the amendment is a comparatively simple matter; but, although simple, all the statutory requisites must be complied with, or there is danger that the amended charter may be declared null and void.<sup>1</sup>

## § 515. Stockholders Authorize Amendment.

The various state statutes prescribe minutely the procedure in such cases. The amendment must almost universally be authorized at a meeting of the stockholders. Action by the directors alone will not generally suffice.<sup>2</sup>

<sup>1</sup> Day v. Mill-Owners' Mut. Fire Ins. Co., 75 Iowa, 694, 38 N. W. 113.

<sup>2</sup> State ex rel. Brun v. Oftedal, 72 Minn. 498, 75 N. W. 692; 2 Cook, Corp. § 499 et seq.; 1 Clark & M. Corp. § 57c. See chapter XII, § 254.

**§ 516. Notice of Meeting.**

To authorize amendments, notice of the meeting must be given in the statutory manner, both by publication and by mail. Such notice may, however, be waived by the unanimous consent of all the stockholders, evidenced either by their expressed consent, or by their participation in the meeting without objection.<sup>3</sup>

**§ 517. Manner of Voting.**

The vote must be taken precisely as the law prescribes, and the action of the statutory number of stockholders will be binding. Sometimes that action must be unanimous, as when the charter amendment is for the purpose of increasing the authorized capital in order that preferred shares may be issued, in which case the rights of no dissenting stockholder can be postponed to those of holders of preferred stock, unless warrant for this is found in the statutes.<sup>4</sup> If the proposition is to increase the capital stock by a further issue of common stock, such proposition may be legally authorized by a two-thirds or a majority vote, depending upon the statutory provision. So likewise with a proposition to reduce the capital stock, to change the par value and the number of shares, to change the corporate name, or to change the location of the principal office.

**§ 518. What Amendments May be Made.**

It is difficult to state just in what respects the charter may be amended. No amendment may be made so as to vest in the company a power not authorized by the law of the state.<sup>5</sup>

<sup>3</sup> See chapter XI, §§ 221, 222.

<sup>4</sup> *Jones v. Concord & M. R. R.*, 67 N. H. 119, 38 Atl. 120; *Campbell v. American Zylonite Co.*, 122 N. Y. 455, 25 N. E. 853, 11 L. R. A. 596, reversing (Super. Ct.) 3 N. Y. Supp. 822.

<sup>5</sup> *State ex rel. Steubenville Gas & Electric Co. v. Taylor*, 55 Ohio St. 61, 44 N. E. 513.

Inasmuch as the object of an amendment is to enable the corporation to do something which the state law permits, but for which the original charter was not sufficiently broad, it may be said generally that the amendment may be made in almost any particular which may be covered by original articles of association filed by a company of the same class in that state. This embraces the power to increase or diminish stock, to alter the character of the business, to change the location of its office, vary the number or the classes of its directors, etc. If a statute authorizes the formation of a corporation for the accomplishment of only one object, it cannot afterwards amend its charter so as to embrace some other object as well.<sup>6</sup>

### § 519. Change of Name.

As frequent a reason for amendment as any is found in the desire to change the corporate name. Generally the statutes provide specifically how this may be accomplished. Sometimes, however, the incorporation act does not cover this subject. In that event, if a statute can be found which authorizes the name of a "person" to be changed, and the word "person" is either by statute or judicial construction held to apply to corporations, there would seem to be no good reason why the procedure outlined in the law applying to the change of names of persons should not be resorted to to effect the same thing for a corporation. This is the practice in the District of Columbia.<sup>7</sup>

### § 520. Certificate of Amendment.

After an amendment has been duly authorized, the next step is to apprise the proper authorities of the state of this change. This is usually done by a formal certificate under the hand and seal of certain prescribed officers, giving the requisite information. The statutory form should be followed.

<sup>6</sup> *Dancy v. Clark*, 24 App. D. C. 487.

<sup>7</sup> See Code of Law D. C. 1901, §§ 1298-1300; section 3 of preamble to Code of Law D. C. 1901.

## CHAPTER XXV

## REORGANIZATION

- § 521. Reasons for.
- 522. Voluntary Sale.
  - 523. Meeting of Stockholders of Old Company.
  - 524. Resolution Authorizing Directors to Sell.
  - 526. Meeting of Directors of Old Company.
  - 528. Proposal from Old Company.
  - 529. Meeting of Incorporators and Subscribers to Stock of New Company.
  - 530. Resolution Authorizing Directors to Purchase.
  - 531. Meeting of Directors of New Company.
  - 532. Resolution Accepting Proposition of Sale.
  - 533. Acceptance by New Company.
  - 534. Payment in Stock.
  - 535. Donation of Stock.
  - 536. Reorganization Completed.

§ 521. Reasons for.

It may be found that an amendment to the charter will not place the corporation upon the basis desired, and that a thorough reorganization will have to be resorted to. The reasons for this may be various. Possibly the laws do not permit of an amendment sufficiently liberal in its scope to accomplish the result desired; or perhaps experience may have demonstrated that the laws of the parent state of the corporation are not well adapted to the conduct of the particular enterprise; or it may be that it is desired to "freeze out" certain stockholders; or the corporation is so thoroughly insolvent that the only way to save anything from the wreck is to sell out to a new corporation and dissolve the old and start afresh. Sometimes it is found that although the stock is issued full paid and nonassessable it is absolutely necessary to raise more money to carry on the enterprise; that this cannot be done by an increase of stock, but only by voluntary assessment; and

that certain stockholders are not willing to bear their pro rata share of this added burden. In that event it is not an infrequent practice to permit the assets of the old corporation to be sold out and bought in by a new company composed of those stockholders in the old who are willing to risk more money in the venture. Whatever the reasons which underlie the reorganization may be, such reorganization usually involves either a forced or voluntary sale by the old company to the new, and the issuance of stock in the new company to all or a few of the stockholders of the old, upon a certain basis.

### § 522. Voluntary Sale.

If the sale of the corporate assets of the existing company is a voluntary one, this involves, first, a meeting of the stockholders of the old company; second, a meeting of the directors of the old company; third, the preparation of a proposition to the new company in accordance with the resolutions passed at the two meetings last above referred to; fourth, a meeting of incorporators of the new company; fifth, a meeting of the directors of the new company; sixth, the acceptance of the proposition above referred to; seventh, the formal transfer of the property; eighth, payment therefor either in stock or in cash. Taking these various steps in order, we shall first discuss:

### § 523. Meeting of the Stockholders of the Old Company.

In view of the fact that this is a meeting to consider business outside of the ordinary objects of the corporation (which are to *conduct*, not to *wind up*, its affairs), particular care should be taken to advise all the stockholders of the meeting, and of its time and place, giving this notice personally, and, if required by statute, also by publication, in such form and for such length of time as the law prescribes.<sup>1</sup> The usual

<sup>1</sup> Mutual Fire Ins. Co. v. Farquhar, 86 Md. 668, 39 Atl. 527; People's Mut. Ins. Co. v. Westcott, 14 Gray (Mass.) 440; Jones v. Concord & M. R. R., 67 N. H. 119, 38 Atl. 120; Bagley v. Reno Oil Co., 201 Pa. 78, 50 Atl. 760, 56 L. R. A. 184.

form of proxy given for an ordinary meeting cannot be voted upon this proposition to sell the entire assets of the company.<sup>2</sup>

### § 524. Resolution Authorizing Directors to Sell.

After the notice of the meeting has been read and the objects stated, the stockholders should pass a resolution similar to the following:

Whereas, a corporation has been organized under the laws of the state of ....., known as the ..... Company, for the purpose of conducting business similar to that conducted by this company, with a capital stock of one hundred thousand dollars, divided into one thousand shares; and

Whereas, it is the judgment of the stockholders of this company that it is expedient to sell to the said company the entire plant, property, and assets of this company, provided an adequate price can be obtained therefor; and

Whereas, no stock has yet been issued by said (fill in name of new company) Company, and the individual incorporators thereof have agreed that in case the proposition authorized by this resolution is accepted by said company a condition of said acceptance shall be that the property hereinabove referred to shall be taken to include the subscription price agreed to be paid by said incorporators, who are five in number:

Now, therefore, be it unanimously resolved that the directors of this company be and they are hereby authorized, if in their judgment it is expedient so to do, to sell to said ..... Company the entire plant, property, and assets of this company for the sum of one hundred thousand dollars, to be paid in the full-paid and non-assessable capital stock of said ..... Company at par, said property hereinabove referred to be taken to include the amount agreed to be paid by the five incorporators of said ..... Company, the stock in payment therefor to be issued to the following distributees in the amounts set opposite their respective names, to wit:

(Note.—Here should be inserted a schedule containing the names of the incorporators of the new company, opposite which will be set the number of shares subscribed for by each of said incorporators in the new company, which will, under our proposed scheme, generally be one share each. Then the name of the old corporation should follow for such amount of stock as it is proposed to donate

<sup>2</sup> Smith v. Smith, 3 Desaus. (S. C.) 557.

as a working capital for the new company, the amount of this donation in our proposed scheme to be twenty-five thousand dollars. After this, the names of the stockholders of the old corporation should be inserted in the schedule, opposite each name being set such number of the balance of the shares in the new company as will equal his proportionate interest in the old corporation.)

And be it further resolved that the proper officers of this company be and they are hereby empowered to execute, acknowledge, and deliver all contracts, deeds, and other documents necessary and proper for carrying into effect this proposition, if the same shall be accepted.

And be it further resolved that, if said proposition shall be accepted, the directors of this corporation be and they are hereby authorized to donate to said ..... Company twenty-five thousand dollars par value of the stock of said ..... Company, to be issued directly to this corporation as hereinabove provided, said stock so to be donated to be held by said company or by trustees for its benefit, and to be used as a working capital, subject to the orders of its board of directors.

§ 525. The arrangements outlined in this chapter can only be effected by the unanimous consent of the stockholders, and not then unless the rights of all the creditors are protected. Otherwise the directors would expose themselves to liability for illegally disposing of the capital to the detriment of creditors.<sup>3</sup> Arrangements should be made for paying the debts of the old corporation prior to the transfer; otherwise, the old stockholders may be held to individual liability for them, or the creditors might pursue the assets in the possession of the new company.<sup>4</sup>

<sup>3</sup> Curran v. Arkansas, 15 How. (U. S.) 304, 14 L. Ed. 705; Mason v. Pewabic Mining Co., 133 U. S. 50, 10 Sup. Ct. 224, 33 L. Ed. 524; Russell v. Post, 138 U. S. 425, 11 Sup. Ct. 353, 34 L. Ed. 1009; Post v. Beacon Vacuum Pump & Electrical Co., 84 Fed. 371, 28 C. C. A. 431; Armant v. New Orleans & C. R. Co., 41 La. Ann. 1020, 7 South. 35; Noyes, Intercorporate Rel. § 110 et seq., and notes; 2 Cook, Corp. § 671 et seq.; 10 Cyc. 286.

<sup>4</sup> Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. (C. C.) 13 Fed. 516; Blair v. St. Louis, H. & K. R. Co. (C. C.) 22 Fed. 36; McVicker v. American Opera Co. (C. C.) 40 Fed. 861; Blanc v. Paymaster Mining Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; Weight-

### § 526. Meeting of the Directors of the Old Company.

At the directors' meeting called pursuant to authority conferred as above by the stockholders, a resolution should be passed directing the submission to the new company of the proposition above referred to. This resolution may be in the following form:

### § 527.

Whereas, the stockholders of this company in meeting assembled for this purpose on the ..... day of ....., A. D. 19. ., authorized this board, if in its judgment it is expedient so to do, to submit to the ..... Company, a corporation organized and existing under the laws of the state of ....., the proposition hereinafter set forth; and

Whereas, in the judgment of this board it is expedient that such proposition should be submitted, and, if accepted, carried into effect:

Now, therefore, be it resolved that the proper officers of this company be, and they are hereby, empowered and directed to communicate to the ..... Company aforesaid a proposition to sell to the said company the entire plant, property, and assets of this corporation for the sum of one hundred thousand dollars, to be paid in full-paid and nonassessable stock of the said ..... Company at par, said property hereinabove referred to to be taken to include also the amount agreed to be paid by the five incorporators of said ..... Company, stock in payment therefor to be issued to the following distributees in the amounts set opposite their respective names.

(Insert schedule as in stockholders' resolution outlined in § 524.)

man v. Washington Critic Co., 4 App. D. C. 136; Montgomery & W. P. R. Co. v. Boring, 51 Ga. 582; Hill v. Gruell, 42 Ill. App. 411; Hancock v. Holbrook, 40 La. Ann. 53, 3 South. 351; Stokes v. Detrick, 75 Md. 256, 23 Atl. 846; Episcopal Charitable Soc. v. Episcopal Church in Dedham, 18 Mass. (1 Pick.) 372; Welsh v. First Division of St. Paul & P. R. Co., 25 Minn. 314; Evans' Adm'r v. Exchange Bank of Jefferson City, 79 Mo. 182; Cary v. Schoharie Val. Mach. Co., 2 Hun, 110; Darcy v. Brooklyn & N. Y. Ferry Co., 196 N. Y. 99, 89 N. E. 461, 26 L. R. A. (N. S.) 267, 134 Am. St. Rep. 827; Marshall v. Western N. C. R. Co., 92 N. C. 322; Thorp v. Wegefarth, 56 Pa. (6 P. F. Smith) 82, 93 Am. Dec. 789; Montgomery Web Co. v. Dienelt, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663; Barksdale v. Finney, 55 Va. 338; 2 Cook, Corp. § 673, and notes; 10 Cyc. 286, and notes; see *infra*, note 3.

And be it further resolved that the proper officers of this company be, and they are hereby, empowered and directed to execute, acknowledge, and deliver all contracts, deeds, and assignments, and other documents necessary and proper for carrying into effect said proposition if accepted, and that ..... be, and he is hereby, appointed attorney in fact for this company, for it and in its name to appear before any officer authorized to take acknowledgments of deeds, and acknowledge all proper deeds and conveyances for and on behalf of this company and in its corporate name.

And be it further resolved that, if said proposition is accepted, the proper officers of this company are empowered and directed to donate to the said ..... Company twenty-five thousand dollars par value of the stock to be issued to this company in part payment for the property aforesaid, in accordance with the terms of the resolution of the stockholders hereinabove referred to, and for that purpose to execute and deliver all necessary and proper assignments and transfers of certificates of stock.

### § 528. Proposal from the Old Company.

(Fill in date.)

To the ..... Company—

Gentlemen:

Pursuant to resolutions unanimously adopted at meetings of the stockholders and directors of this company duly convened for the purpose, I am authorized and directed to communicate to you the following proposition:

Our company proposes to sell to your company our entire plant, property, and assets for the sum of one hundred thousand dollars, to be paid in full-paid and nonassessable capital stock of your company at par, said property to be taken, under an agreement with the individual incorporators of your company, to include also the amount agreed to be paid by them on account of their subscriptions; stock in payment for said property to be issued to the following distributees in the amounts set opposite their respective names:

(Fill in this schedule, as in the resolution of stockholders, § 524.)

In case you decide to accept the foregoing proposition I am instructed to say that our company will donate to your company, or to trustees of your company to be named by you, twenty-five thousand dollars par value of the stock to be issued to our company as above suggested, such stock to be held and used by your company or its trustees as aforesaid for your benefit as a working capital, subject to the orders of your board of directors.

Yours very truly,

.....  
 Secretary ..... Company.  
 (365)

### § 529. Meeting of Incorporators and Subscribers to the Stock of New Company.

The meeting having been convened in the manner pointed out in chapter XI, and the necessary preliminaries having been disposed of, the letter of the secretary of the old company will be read, after which a resolution similar to that following should be adopted:

### § 530. Resolution Authorizing Directors to Purchase.

Whereas, a proposition has been received from the ..... Company offering to sell to this company its entire plant, property, and assets, for the sum of one hundred thousand dollars, to be paid in the full-paid and nonassessable capital stock of this company at par, said property, under an agreement with the individual incorporators of this company, to include also the amount agreed to be paid by them on account of their subscriptions, said proposition also containing an offer, in case of its acceptance by this company, to donate to this corporation or trustees to be named by it twenty-five thousand dollars par value of its stock to be issued in part payment for said property, said stock to be held and used by this company or its trustees as aforesaid for its benefit as a working capital, subject to the orders of the board of directors of this corporation; and

Whereas, in the judgment of the incorporators and subscribers to the capital stock of this company, the said proposition is fair and reasonable, and the value of the property offered is equal to that of the stock proposed to be issued in payment therefor, and such property is necessary to enable this company to properly conduct its affairs:

Therefore be it resolved that the board of directors be and it is hereby authorized and requested, if in its judgment it is expedient so to do, to accept said proposition and purchase the property above mentioned in accordance with the terms thereof, and to issue stock in payment therefor, to the following distributees in the amounts set opposite their respective names, to wit:

(Insert schedule as in § 524.)

And be it further resolved that such property shall be accepted in full payment of the subscriptions of the individual incorporators of this company, and said incorporators shall be released from all further obligation under their said subscriptions.

And be it further resolved that ..... and ..... be, and they are hereby, appointed trustees to receive and to hold the twenty-five thousand dollars par value of stock to be donated to this

company under the terms of said proposition, in accordance with such instructions as may from time to time be given them by the board of directors.

### § 531. Meeting of Board of Directors of New Company.

The board having been convened, and the preliminary formalities and business described in chapter XVI having been disposed of, the proposition under consideration will then come up for discussion, and if looked upon favorably the following resolution should be passed, or one in a similar form:

### § 532. Resolution Accepting Proposition of Sale.

Whereas, the incorporators and subscribers to the capital stock of this company in meeting duly assembled for that purpose on the ..... day of ....., A. D. 19.., authorized this board, if in its judgment it should be expedient so to do, to accept a proposition from the ..... Company to purchase from it its entire plant, property, and assets for the sum of one hundred thousand dollars, to be paid in full-paid and nonassessable stock of this company at par, said property, under an agreement with the individual incorporators of this company, to include also the amount agreed to be paid by them on account of their subscriptions; said ..... Company also to donate to this company, or to trustees to be named by it, twenty-five thousand dollars par value of the stock to be issued in part payment for said property; and

Whereas, in the judgment of this board said property is of the fair value of one hundred thousand dollars, and the same is necessary to enable this company to properly conduct its affairs, and it is expedient that said proposition should be accepted:

Now, therefore, be it resolved that the said proposition be, and it is hereby, accepted, and the proper officers of this company are hereby empowered and directed to communicate the fact of said acceptance to the ..... Company, and to receive on behalf of this corporation the duly executed transfers and assignments of said property, and to issue in exchange therefor certificates of the capital stock of this company of the par value of one hundred thousand dollars full paid and nonassessable, in the names of the following distributees, in the proportions set opposite their respective names, to wit:

(Insert schedule as in § 524.)

And be it further resolved that an assessment of one hundred per cent. be levied upon the shares of stock subscribed for by the in-

corporators, and that this company accept in payment of said subscriptions and assessment the property embraced within the proposition aforesaid.

And be it further resolved that ..... and ..... be, and they are hereby, authorized to receive the twenty-five thousand dollars par value of stock to be donated to this company under the terms of said proposition, and directed to hold the same subject to the further orders of this board.

### § 533. Acceptance by New Company.

To the ..... Company—

(Fill in date.)

Gentlemen:

In accordance with resolutions unanimously passed by the incorporators and subscribers to the capital stock of our company, and by the board of directors thereof, in meetings duly assembled, I am instructed to communicate to you the fact that your proposition contained in a letter dated ....., to sell to our company the entire plant, property, and assets of your corporation for the consideration and upon the terms therein stated, has been accepted, and that our company will be pleased to receive from you at an early date the duly executed transfers of said property, in return for which stock will be issued in accordance with your proposition as submitted in said letter.

Respectfully,

.....,  
Secretary ..... Company.

### § 534. Payment in Stock.

For a full treatment of this subject the reader is referred to chapter XIX.

### § 535. Donation of Stock.

After the twenty-five thousand dollars par value of stock shall have been issued to the old company in accordance with our supposed proposition, the old company will then, in compliance with its promise, transfer the same to the new company or to trustees for its use.

**§ 536. Reorganization Completed.**

Assuming that the new company has properly met, elected directors and officers, adopted by-laws, and gone through the necessary formalities hereinbefore outlined in chapters XI, XIII, XIV, XVI, XVII, XVIII, and XIX, the process of reorganization will then have been completed, and the new company will be ready to enter upon the prosecution of its business.

## CHAPTER XXVI

## DISSOLUTION

§ 537. Involuntary Dissolution.

538. Voluntary Dissolution.

539. Status Pending Dissolution.

540. Effect of Dissolution.

## § 537. Involuntary Dissolution.

Dissolution may be either voluntary or involuntary. Any one of several causes, or all combined, may work an involuntary dissolution, as the expiration of the term for which the corporation was created,<sup>1</sup> the happening of a contingency which by law forfeits the charter,<sup>2</sup> under certain circumstances the failure of the purposes for which it was organized,<sup>3</sup> the misuse of corporate powers,<sup>4</sup> etc.; but, in general, it may be said that, in order to work the forfeiture of the charter of a corporation, there must be something wrong arising from willful abuse or improper neglect, something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power.<sup>5</sup> The state may always

<sup>1</sup> *People v. Walker*, 17 N. Y. 502; *La Grange & M. R. Co. v. Rainey*, 47 Tenn. (7 Cold.) 420.

<sup>2</sup> *People ex rel. Attorney General v. City Bank of Leadville*, 7 Colo. 226, 3 Pac. 214; *People ex rel. Attorney General v. Kankakee River Imp. Co.*, 103 Ill. 491; *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill & J. (Md.) 1.

<sup>3</sup> *Price v. Holcomb*, 89 Iowa, 123, 56 N. W. 407; *Moore v. Whitcomb*, 48 Mo. 543.

<sup>4</sup> *President, etc., of Washington & B. Turnpike Road v. State*, 19 Md. 239; *State v. Easton Social Literary & Musical Club of Talbot County*, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64; *State ex rel. Dilworth v. Council Bluffs & N. Ferry Co.*, 11 Neb. 354, 9 N. W. 563.

<sup>5</sup> *Vincennes University v. Indiana*, 55 U. S. (14 How.) 268, 14 L. Ed. 416; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; *State v. Merchants' Ins. & Trust Co.*, 27 Tenn. (8 Humph.) 235.

take appropriate proceedings to annul or vacate the charter of a corporation in a proper case,<sup>6</sup> but until a judgment of ouster is rendered the corporation is not usually dissolved for misconduct.<sup>7</sup>

### § 538. Voluntary Dissolution.

Almost invariably the state statutes provide for a method of voluntary dissolution.<sup>8</sup> Under such statutes a corporation has a right to dissolve and surrender its franchises whenever the proper circumstances arise.<sup>9</sup> While there is no legal necessity for the dissolution of a corporation after all its assets have been transferred, it is certainly wise to do so. By so doing stockholders and directors avoid any possible liability which may subsequently be caused by the unauthorized acts of officers in dealing with third persons, who are unaware of their lack of authority.<sup>10</sup>

<sup>6</sup> *Mumma v. Potomac Co.*, 33 U. S. (8 Pet.) 281, 8 L. Ed. 945; *Darnell v. State*, 48 Ark. 321, 3 S. W. 365; *State ex rel. Robinson v. Bacon Club of Neosho*, 44 Mo. App. 86.

<sup>7</sup> *Davis v. Gray*, 83 U. S. (16 Wall.) 203, 21 L. Ed. 447; *Mackall v. Chesapeake & O. Canal Co.*, 94 U. S. 308, 24 L. Ed. 161; *Regents of University of Maryland v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

<sup>8</sup> *In re Pensacola Lumber Co.*, Fed. Cas. No. 10,959, 8 Ben. 171; *Wolfe v. Underwood*, 91 Ala. 523, 8 South. 774; *Forstall v. Consolidated Ass'n of Planters of Louisiana*, 34 La. Ann. 770; *Lake Ontario Nat. Bank v. Onondaga County Bank*, 7 Hun (N. Y.) 549; *In re Marietta Bldg. & Loan Ass'n*, 10 Lanc. Bar (Pa.) 37.

<sup>9</sup> *Merchants' & Planters' Line v. Waganer*, 71 Ala. 581; *People v. President, etc., of College of California*, 38 Cal. 166; *Cronin v. Potters' Co-Operative Co.*, 29 Wkly. Law Bul. (Ohio) 52; *Lauman v. Lebanon Valley R. Co.*, 30 Pa. (6 Casey) 42, 72 Am. Dec. 685; *Attorney General ex rel. Independent or Cong. Church of Wappetaw v. Society for Relief of Elderly & Disabled Ministers, and of Widows and Orphans of Clergy of Independent or Cong. Church*, 10 Rich. Eq. (S. C.) 604.

<sup>10</sup> *Miller v. Newburg Orrel Coal Co.*, 31 W. Va. 836, 8 S. E. 600, 13 Am. St. Rep. 903.

**§ 539. Status Pending Dissolution.**

While dissolution proceedings are pending, the corporation continues to exist for the purposes of collecting and distributing its assets and winding up its affairs; but it cannot engage in new business.<sup>11</sup> Actions by and against the corporation may be prosecuted to a final determination.<sup>12</sup> The directors are held to be trustees for its creditors and stockholders.<sup>13</sup>

**§ 540. Effect of Dissolution.**

After the expiration of its charter a corporation ceases to exist for any purposes,<sup>14</sup> although the proper court still has power to direct the application of its assets among those entitled.<sup>15</sup>

<sup>11</sup> Wallamet Falls C. & L. Co. v. Kittredge, Fed. Cas. No. 17,104; Herron v. Vance, 17 Ind. 595.

<sup>12</sup> Pomeroy v. State Bank of Indiana, 68 U. S. (1 Wall.) 23, 17 L. Ed. 500; Saltmarsh v. Planters' & Merchants' Bank, 14 Ala. 668.

<sup>13</sup> Sprague-Brinmer Mfg. Co. v. M. J. Murphy Furnishings Goods Co. (C. C.) 26 Fed. 572; Clark v. City and County of San Francisco, 53 Cal. 306; Ervin v. Oregon Steam Navigation Co., 22 Hun (N. Y.) 598.

<sup>14</sup> Bank of Mississippi v. Wrenn, 11 Miss. (3 Smedes & M.) 791.

<sup>15</sup> Shields v. Ohio, 95 U. S. 319, 24 L. Ed. 357; Taylor v. Holmes (C. C.) 14 Fed. 498; People v. National Trust Co. of City of New York, 82 N. Y. 283.

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